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THE
LAW JOURNAL REPORTS

FOR
THE YEAR 1842:

COMPRISING
REPORTS OF CASES

IN THE COURTS OF
**Chancery, and Bankruptcy, Queen's Bench, Common Pleas,
Exchequer of Pleas,
Exchequer Chamber, and the Hall Court,**

FROM
MICHAELMAS TERM, 1841, TO TRINITY TERM, 1842,
BOTH INCLUSIVE;
And NOTES of JUDGMENTS in the HOUSE of LORDS, during that Period.

EDITED BY MONTAGU CHAMBERS, OF LINCOLN'S INN, ESQ.
BARRISTER-AT-LAW.

VOL. XX.

NEW SERIES—VOL. XI.
PART I. CHANCERY AND BANKRUPTCY.

LONDON :

Printed by James Holmes, 4, Took's Court, Chancery Lane.

PUBLISHED BY E. B. INCE, 5, QUALITY COURT, CHANCERY LANE.

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NAMES OF THE REPORTERS.

1842.

Lord Chancellor's Court and Rolls Court,

PHILIP TWELLS, Esq. and FREDERICK JAMES HALL, Esq.
BARRISTERS-AT-LAW.

Court of the Vice Chancellor of England,

THOMAS WYATT GUNNING, Esq. BARRISTER-AT-LAW.

Court of the First Vice Chancellor,

BENEDICT LAWRENCE CHAPMAN, Esq. BARRISTER-AT-LAW.

Court of the Second Vice Chancellor,

EDWARD COOKE, Esq. BARRISTER-AT-LAW.

Court of Bankruptcy,

CHARLES STURGEON, Esq. and EWEN HENRY CAMERON, Esq.
BARRISTERS-AT-LAW.

Court of Queen's Bench,

JOHN DEEDES, Esq. and HERMAN MERIVALE, Esq. BARRISTERS-AT-LAW.

Court of Common Pleas and Bail Court,

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BARRISTERS-AT-LAW.

Exchequer of Pleas and Exchequer Chamber,

HENRY HORN, Esq., FRANCIS TOWERS STREETEN, Esq. and
GEORGE MORLEY DOWDESWELL, Esq. BARRISTERS-AT-LAW.

CASES RELATING TO MAGISTRATES,

REPORTED PRINCIPALLY BY

JOHN DEEDES, Esq. and HERMAN MERIVALE, Esq. BARRISTER-AT-LAW.

JUDGES AND LAW OFFICERS.

FROM MICHAELMAS TERM, 1841, TO TRINITY TERM, 1842, INCLUSIVE.

IN THE COURTS OF CHANCERY.

The Right Hon. LORD LYNTHURST, Lord High Chancellor.
The Right Hon. LORD LANGDALE, Master of the Rolls.
The Right Hon. Sir LANCELOT SHADWELL, Knt., Vice Chancellor of England.
The Right Hon. Sir JAMES LEWIS KNIGHT BRUCE, Knt., First Vice Chancellor.
The Right Hon. Sir JAMES WIGRAM, Knt., Second Vice Chancellor.

IN THE COURT OF REVIEW, IN BANKRUPTCY.

The Right Hon. THOMAS ERSKINE, Chief Judge.
The Hon. Sir JOHN CROSS, Knt.
The Hon. Sir GEORGE ROSE, Knt.

IN THE COURT OF QUEEN'S BENCH.

The Right Hon. THOMAS LORD DENMAN, Lord Chief Justice.
The Hon. Sir JOHN PATTESON, Knt.
The Hon. Sir JOHN WILLIAMS, Knt.
The Hon. Sir JOHN TAYLOR COLERIDGE, Knt.
The Hon. Sir WILLIAM WIGHTMAN, Knt.

IN THE COURT OF COMMON PLEAS.

The Right Hon. Sir NICHOLAS CONYNGBAM TINDAL, Knt., Chief Justice.
The Right Hon. Sir JOHN BERNARD BOSANQUET, Knt.
The Hon. Sir THOMAS COLTMAN, Knt.
The Right Hon. THOMAS ERSKINE.
The Hon. Sir WILLIAM HENRY MAULE, Knt.
The Hon. Sir CRESSWELL CRESSWELL, Knt.

IN THE COURT OF EXCHEQUER.

The Right Hon. LORD ABINGER, Lord Chief Baron.
The Hon. Sir JAMES PARKE, Knt.
The Hon. Sir EDWARD HALL ALDERSON, Knt.
The Hon. Sir JOHN GURNEY, Knt.
The Hon. Sir ROBERT MOUNSEY ROLFE, Knt.

Sir FREDERICK POLLOCK, Knt., Attorney General.
Sir WILLIAM WEBB FOLLETT, Knt., Solicitor General.

PREFERMENTS AND MEMORANDA.

IN the vacation between *Trinity* and *Michaelmas Terms*, LORD PLUNKETT resigned the office of Lord Chancellor of Ireland, and was succeeded by Sir JOHN CAMPBELL, Knt., Her Majesty's Attorney General, who was created a Peer, by the title of LORD CAMPBELL. Sir T. WILDE, Her Majesty's Solicitor General, was thereupon appointed Her Majesty's Attorney General, vice LORD CAMPBELL.

W. WHATELY, Esq., R. GODSON, Esq., S. SHARP, Esq., C. J. KNOWLES, Esq., M. T. BAINES, Esq., The Hon. J. STUART WORTLEY, and A. E. COCKBURN, Esq., were appointed Her Majesty's Counsel learned in the law. C. AUSTIN, Esq. received a patent of precedency; and J. V. THOMPSON, Esq. was called to the degree of Serjeant-at-Law.

LORD COTTENHAM having resigned the Great Seal, LORD LYNDHURST was again appointed Lord High Chancellor of Great Britain. The office of Lord Chancellor of Ireland was conferred on Sir EDWARD SUGDEN, vice LORD CAMPBELL; Sir F. POLLOCK, Knt., was appointed Her Majesty's Attorney General, vice Sir T. WILDE, Knt.; and Sir W. W. FOLLETT, Knt., Her Majesty's Solicitor General.

At the commencement of *Michaelmas Term*, 1841, J. L. KNIGHT BRUCE, Esq., and J. WIGRAM, Esq., received the appointments of Vice Chancellors, under the statute 5 Vict. c. 5. s. 19. They were soon afterwards Knighted, and were, by command, sworn of Her Majesty's Most Honourable Privy Council.

In this term also, E. WILBRAHAM, Esq., W. MATTHEWS, Esq., J. H. KOE, Esq., J. G. TEED, Esq., W. L. LOWNDES, Esq., T. PURVIS, Esq., J. WALKER, Esq., R. S. PARKER, Esq., J. RUSSELL, Esq., R. P. ROUPELL, Esq., T. O. ANDERDON, Esq., and L. WIGRAM, Esq., were appointed Her Majesty's Counsel learned in the law.

Sir J. BERNARD BOSANQUET resigned his seat on the Bench of the Court of Common Pleas, and CRESSWELL CRESSWELL, Esq., one of Her Majesty's Counsel, was promoted to the vacant office.

In the vacation between *Hilary* and *Easter Terms*, FRANCIS STACK MURPHY, Esq. was advanced to the dignity of the Coif, and gave rings, with the motto, "*Incidere Ludum.*"

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Courts of Chancery.

BY
PHILIP TWELLS, Esq., FREDERICK JAMES HALL, Esq.,
THOMAS WYATT GUNNING, Esq., EDWARD COOKE, Esq.,
and BENEDICT LAWRENCE CHAPMAN, Esq.,
BARRISTERS-AT-LAW.

5 & 6 VICTORIÆ.

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MEMORANDA, PROMOTIONS, AND ORDERS.

DURING the vacation between Trinity and Michaelmas Terms, LORD COTTENHAM resigned the Great Seal, and LORD LYNDEHURST was again appointed Lord High Chancellor.

By the statute 5 Vict. c. 5. s. 1, the jurisdiction of the Court of Exchequer as a Court of Equity was abolished and transferred to the Court of Chancery, from the 15th day of October 1841, and Her Majesty was empowered to appoint two additional Judges assistant to the Lord Chancellor, each of such additional Judges to be called Vice Chancellor. The Lord Chancellor thereupon made the following—

GENERAL ORDER.

Tuesday, October 12th, 1841.

WHEREAS an Act was passed in the fifth year of the reign of Her present Majesty, intituled "An Act to make further provisions for the Administration of Justice:" Now, for giving effect to certain provisions in the said Act for transferring to this Court all suits and matters which, on the 15th day of October instant, shall be depending in Her Majesty's Court of Exchequer as a Court of Equity, or under the special authority of any Act or Acts of Parliament, I DO HEREBY ORDER, that every plaintiff and defendant, in any suit to be transferred under the authority of the above recited act, shall on or before the said 15th day of October, instant, name one of the sworn clerks of this Court to conduct and carry on and act in such suit as clerk in court, according to the usual practice of this Court; and in default thereof either party to the suit may cause to be served upon the other, a notice in writing, requiring the party served to appoint a clerk in court, within seven days after the day of service of such notice, which shall be left at the dwelling-house, or usual place of abode of such party; but if such dwelling-house or usual place of abode cannot be ascertained, and affidavit shall be made to that effect, then service of such notice upon the solicitor who was last concerned for such party in the Court of Exchequer, shall be deemed good service. And in case at the expiration of the period so to be mentioned in such notice, no clerk in Court shall have been appointed according to the requisition thereof, then the party giving such notice shall be at liberty to apply to this Court to appoint a clerk in court for the party so making default as aforesaid, and such application may be upon motion or petition, without notice, but it shall be supported by an affidavit of such notice as aforesaid having been served, and of the address of the party or solicitor served. And I do hereby further Order, that no proceeding shall be taken by any party, in any suit, so to be transferred as aforesaid, until after the appointment of a clerk in court; and that, where such appointment shall be made by the Court, the order directing the same shall contain the address of the party so making default in such appointment, or of the solicitor, so representing such party as aforesaid, in order that the clerk in court so appointed may be enabled to forward notices and other

matters to such party. And I do hereby further Order, that so far as regards the taxation and allowance of costs in any of the suits or matters so to be transferred as aforesaid, and which shall not by any order of this Court be directed to be regulated in that particular by the present practice of the Court of Exchequer, such costs shall be taxed and allowed in manner following (that is to say), the costs previously to the said fifteenth day of October instant, shall be taxed and allowed according to the practice of the said Court of Exchequer, and the costs from and inclusive of the said fifteenth day of October, shall be taxed and allowed according to the practice of this Court.

LYNDHURST, Chancellor.

Under the provisions of the act above mentioned, Her Majesty was pleased to direct letters patent to be passed under the Great Seal, appointing JAMES LEWIS KNIGHT BRUCE, Esq., to be first Vice Chancellor, and JAMES WIGRAM, Esq., to be second Vice Chancellor.

ORDERS OF COURT.

Thursday, the 11th of November 1841.

WHEREAS an Act was passed in the fifth year of the reign of Her present Majesty, entitled, "An Act to make further Provisions for the Administration of Justice," and whereas, under the powers in that Act contained, two additional Vice Chancellors have been appointed; now I DO HEREBY ORDER—

I. That in all informations or bills marked under the first order of the 5th day of May 1837, with the words "Lord Chancellor," the plaintiff shall, underneath the words "Lord Chancellor," write the title of one of the three Vice Chancellors, at his option, and the cause shall thenceforth, unless removed by some special order of the Lord Chancellor, be attached to such Vice Chancellor's Court.

II. That the title of the Vice Chancellor, to whose Court any cause shall be attached, shall be marked in every certificate granted under the second order of the 5th day of May 1837.

III. That, subject in every case to any special order made or to be made by the Lord Chancellor, every cause already heard by any Vice Chancellor since the first day of this present Michaelmas term be attached to the Court of the Vice Chancellor by whom the same has been heard; and every cause standing in the Lord Chancellor's book of causes, down to and inclusive of the cause of *Hodges v. Daly*, shall be attached to the Court of the Judge to whom the same is appropriated in the said book.

IV. That the plaintiff in every cause now in the Lord Chancellor's Court, whether already heard, standing for hearing, or otherwise, except those mentioned in the last preceding order, shall be at liberty to deliver a notice to his clerk in court, stating the name of the Vice Chancellor to whose Court he desires such cause to be attached, and to serve notice thereof on all parties to the cause; and in case the plaintiff shall neglect or omit so to do on or before the 17th day of November instant, the defendant, or any one of the defendants, shall be at liberty to give such notice. And in case, on the 21st day of November instant, no such notice shall have been given, then any person who may be desirous of applying to the Court in such cause, shall be at liberty to give such notice; and that the notice of the plaintiff, if given on or before the said 17th day of November instant, or, if not so given, then the notice, whether of the plaintiff or of any one of the defendants, first given after the said 17th day of November instant, and before the said 21st day of November instant; and the notice of the plaintiff, or of any one of the defendants, or of the person desirous of applying as aforesaid, first given on or after the said 21st day of November instant, shall determine the Court to which such cause shall be attached, unless removed therefrom by any special order to be made by the Lord Chancellor. And that no party or person shall move, petition, or take any proceedings until such notice has been given.

V. That all motions, petitions, and further proceedings in causes in the Lord Chancellor's Court, except any motions or proceedings which are now part heard, shall be had before the Judge to whose court the same shall, under the provisions of these orders, be attached, unless removed therefrom by any special order of the Lord Chancellor.

VI. That all notices of motion not in any cause, and all petitions not in any cause, which are presented to the Lord Chancellor shall be marked with the title of one of the Vice Chancellors, and shall thenceforth be attached to such Vice Chancellor's Court, unless removed therefrom by any special order of the Lord Chancellor.

VII. That the registrars shall keep distinct lists of the causes and other matters to be heard before each Judge.

LYNDHURST, Chancellor.

Wednesday, the 17th of November 1841.

The Right Hon. John Singleton Lord Lyndhurst, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Hon. Henry Lord Langdale, Master of the Rolls, the Right Hon. Sir Lancelot Shadwell, Vice Chancellor of England, the Hon. the Vice Chancellor James Lewis Knight Bruce, and the Hon. the Vice Chancellor James Wigram ; and in pursuance of an Act passed in the 5th year of the reign of Her present Majesty, entitled, "An Act to make further Provisions for the Administration of Justice," doth hereby order and direct in manner following, that is to say—

I. That any person or persons claiming to be interested in any stock transferable at the Bank of England, standing in the name or names of any other person or persons, or body politic or corporate, in the books of the Governor and Company of the Bank of England, may, by his or their solicitor, prepare a writ of *distringas* pursuant to the said Act, in the form set out in the first schedule to the said Act, and may present the same for sealing at the Subpoena Office.

II. That upon the presentment of such writ for sealing, and on leaving with the patentee of the Subpoena Office an affidavit duly sworn by the person, or one of the persons, applying for such writ, or his solicitor, before one of the Masters or Masters Extraordinary of this Court, in the form set out at the foot of these orders, the same writ shall (in conformity with the orders of this Court for issuing and sealing writs of subpoena) be forthwith sealed with the seal of the Subpoena Office; and such writ when sealed shall have the same force and validity as the writ of *distringas* heretofore issued out of the Court of Exchequer.

III. That such writ of *distringas* and all process thereunder may at any time be discharged by the order of this Court, to be obtained as of course upon the petition of the party on whose behalf the writ was issued, and to be obtained upon the application by motion, or notice, or by petition, duly served, of any other person claiming to be interested in the stock sought to be affected by such writ; and that upon or after such application, such costs thereof, and in relation thereto, and to the said writ, as to this Court shall seem just, may, if this Court shall think fit, be awarded, and ordered to be paid by the person or persons who obtained such *distringas*, or upon an application by any other person or persons, by such person or persons.

IV. That the Governor and Company of the Bank of England having been served with such writ of *distringas*, and a notice not to permit the transfer of the stock in such notice and in the said affidavit specified, or not to pay the dividends thereon, and having afterwards received a request from the party or parties in whose name or names such stock shall be standing, or some person on his or their behalf, or representing him or them, to allow such transfer, or to pay such dividends, shall not by force or in consequence of such *distringas* be authorized, without the order of this Court, to refuse to permit such transfer to be made, or to withhold payment of such dividends, for more than eight days after the date of such request.

V. That upon leaving such affidavit as aforesaid with the patentee of the Subpoena Office, there shall be paid to such patentee the sum of 1s. for filing such affidavit; and that within twenty-fours from the time when such affidavit shall be so left, the said patentee shall pay the said sum of 1s. to the clerk of the affidavits, and cause such affidavit to be filed and registered at the office of such clerk.

VI. That upon the sealing of such writ of *distringas* the sum of 5s. 6d. shall be paid to the patentee of the Subpoena Office, and that out of such sum the said patentee shall pay the sum of 4s. to the Accountant General, to be by him placed to the credit of the account entitled "The Suitors' Fee Fund Account."

VII. That for and in respect of the preparation and service of such writ of *distringas* and the *præcipe*, and attendance in respect thereof, such costs shall be allowed as by the rules and practice of this Court are allowed for the preparation and service and attendance in respect of a writ of subpoena to answer a bill.

FORM OF AFFIDAVIT.

"Y. Z. (the name of the party on whose behalf the writ is sued out) v. the Governor and Company of the Bank of England.

"I, A. B. of —, do solemnly swear, that according to the best of my knowledge, information, and belief, I am (or, if the affidavit is made by the solicitor, C. D., of —, is) *bond fide* and beneficially interested in the stock hereinafter particularly described, that is to say, (here specify the amount of the stock to be affected by the writ, and the name or names of the person or persons, or body politic or corporate, in whose name or names the same shall be standing); and that I have reason to believe, and do believe, that there is danger of such stock being dealt with in a manner prejudicial to my interest (or to the interest of the said C. D., as the case may be)."

LYNDHURST, Chancellor.

LANGDALE, Master of the Rolls.

LANCELOT SHADWELL, Vice Chancellor.

J. L. KNIGHT BRUCE, Vice Chancellor.

JAMES WIGRAM, Vice Chancellor.

Friday, 19th November 1841.

WHEREAS it is expedient that further orders should be made for the better administration of justice in the Court of Chancery, with reference to the matters to which the first, second, third, fourth, and fifth orders of the 26th day of August last apply, and that in the meantime the operation of the same orders should be suspended. Now, therefore, I, the Right Hon. John Singleton Lord Lyndhurst, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Hon. Henry Lord Langdale, Master of the Rolls, the Right Hon. Sir Lancelot Shadwell, Vice Chancellor of England, the Hon. the Vice Chancellor James Lewis Knight Bruce, and the Hon. the Vice Chancellor James Wigram, do hereby, in pursuance of an Act of Parliament made and passed in the fourth year of the reign of Her present Majesty, entitled, "An Act for facilitating the Administration of Justice in the Court of Chancery," and of an Act made and passed in the session of Parliament held in the 4th and 5th years of the reign of Her said Majesty, entitled, "An Act to amend an Act of the 4th year of Her present Majesty, entitled, 'An Act for facilitating the Administration of Justice in the Court of Chancery,'" order and direct that the first, second, third, fourth, and fifth orders of the 28th day of August last shall not take effect till the first day of Easter term, 1842.

LYNDHURST, Chancellor.

LANGDALE, Master of the Rolls.

LANCELOT SHADWELL, Vice Chancellor.

J. L. KNIGHT BRUCE, Vice Chancellor.

JAMES WIGRAM, Vice Chancellor.

IT IS ORDERED—That all causes set down and to be set down before the 1st day of December next, and which shall not be attached to the Court of any Vice Chancellor, in pursuance of the orders of the 11th of November instant, before the said 1st day of December, shall on that day be assigned by the Registrars, in the lists required by the last order of the 11th of November instant to be made out by them, to the Courts of the respective Vice Chancellors, according to the rotation adopted in the existing printed book of causes, with reference to the causes set down to and inclusive of the cause of *Hodges v. Daly*.

25th November 1841.

CASES ARGUED AND DETERMINED

IN THE

Court of Chancery.

MICHAELMAS TERM, 5 VICTORIÆ.

L.C. } *Ex parte* DAVIDSON *in re* CAL-
Nov. 4. } DICOTT.

*Banking Company — Construction — 7
Geo. 4. c. 46, and 1 & 2 Vict. c. 96—Proof
—Set-off—Costs.*

A member of a banking company, who kept a banking account with the company as a customer, became bankrupt:—Held, that under the 1 & 2 Vict. c. 96, the company might prove, through their registered officer, for the balance due from the bankrupt member on his banking account.

The costs must follow the result of the appeal as a general rule.

For a report of this case when before the Court of Review, see 10 *Law J. Rep.* (N.S.) Bankr. 58. The question was, whether a banking company, under the acts of parliament, 7 Geo. 4. c. 46. s. 9, and 1 & 2 Vict. c. 96. s. 4, had a right to prove, against one of its members, who had become bankrupt, the amount of a balance due from him in respect of his general banking account with the company.

The Court of Review having decided in the affirmative, the question was brought before the Lord Chancellor, by the assignees of the bankrupt, by way of special case.

Mr. Swanston and *Mr. James Russell*, in support of the appeal, contended, that the issuing of a fiat placed the property of a bankrupt in a course of distribution amongst his credi-

tors, and that it might be just that a banking company should have the power of issuing a fiat against one of its members, but that the act of 1 & 2 Vict. c. 96. never intended that the company should have a right to prove, for the purpose in the first instance of receiving dividends, whilst joint unsatisfied liabilities existed on the part of the company, the debt claimed to be proved having entirely arisen out of accounts which had not been adjusted or settled; that there was nothing to distinguish banking co-partnerships from any other partnerships, and no reason for granting them the privilege insisted on by the other side; and that the true construction of the act was, that the banking company could not be placed in competition with the general creditors of one of its members, who had become bankrupt, and—

Ex parte Moore, 2 Glyn & Jam. 166;

Ex parte Ellis, *ibid.* 312;

Ex parte Law, 1 M. D. & De Gex, 19; were cited in favour of the appeal.

Mr. Griffith Richards and *Mr. Anderdon*, *contra*, contended, that the two acts of parliament must be taken together, and a construction put upon them as if they formed one act; that it could not for a moment be reasonably contended, that if the company had entered up judgment in an action against one of its individual members, it would not be allowed to prove the amount of the judgment; that the word "proceedings" in the act 1 & 2 Vict. c. 96. s. 4, must include proceed-

ings in bankruptcy, and that *Ex parte Ellis* would be a governing authority, without the aid of that act, in which case, it was decided that Ellis could not be allowed to come in competition with those whom he had contracted to pay—*Ex parte Law re Hague* (1). The 9th section of the act 7 Geo. 4. c. 46. enacts, that all actions and suits, and all proceedings at law or in equity, under any commission of bankruptcy, and all other proceedings at law or in equity, by any banking co-partnership, against any persons, whether members of such co-partnership or otherwise, shall be commenced in the name of one of the public officers of, such co-partnership, nominated as therein mentioned. And by the 4th section of the 1 & 2 Vict. c. 96, it is enacted, that no claim or demand which any member of any co-partnership banking company may have, in respect of his share of the capital or joint stock thereof, or of any dividends, interest, profits, or bonus, payable or apportionable in respect of such share, shall be capable of being set off either at law or in equity, against any demand which such co-partnership may have against any such member, on account of any other matter or thing whatsoever; but all proceedings in respect of such other matter or thing may be carried on, as if no claim or demand existed in respect of such capital or joint stock, or of any dividends, interest, profits, or bonus, payable or apportionable in respect thereof.

The LORD CHANCELLOR stated, that in cases like the one before him, it was found absolutely necessary for the legislature to interfere, because banking companies could not carry on their business without further legislative aid; and the approved policy was, to place these banking co-partnerships and their individual members in the relation of strangers to each other (2), as regarded any proceedings either at law or in equity, between them, and to enable the partnership company to sue any of its members through its registered officer. Previously to the passing of the act in question, a difficulty existed about the right of set-off of a member's share in the co-partnership, against the co-partnership's demand against the member;

(1) Mont. & Chit. 590; s.c. 9 Law J. Rep. (N.S.) Bankr. 14.

(2) Vide section 1. of act 1 & 2 Vict. c. 96.

and it appears to me, that from the language used in, as well as from the spirit of the acts, the very case before the Court is provided for. The two acts are *in pari materia*, and the second act in point of date, was passed by the legislature, to give effect to the former act.—[Here his Lordship read the 9th section of the act 7 Geo. 4. c. 46.] In that section, the expression, "proceedings at law and in equity," clearly include proceedings in bankruptcy.—[Here his Lordship read the 4th section of the act 1 & 2 Vict. c. 96.] The terms "such proceedings at law or in equity," included proceedings under fiats in bankruptcy.

His Lordship dismissed the appeal, and added, that as a deliberate judgment had been pronounced in the court below against the petition, after full argument, the rule laid down by his Lordship's immediate predecessor must be followed, and the appeal dismissed, with costs.

V.C. }
Nov. 11. } EVERET V. PRYTHERGCH.

Practice.—Contempt—Exceptions.

A defendant, who is in contempt for not answering, and who has been refused by the Master further time, may file exceptions for scandal, but not for impertinence.

This was a motion on behalf of the plaintiff, that the exceptions taken by the defendant to the plaintiff's bill, might be ordered to be taken off the file for irregularity, and that the order in the cause on the petition of the defendant, dated the 26th of October, whereby the said exceptions were referred to the Master to whom the cause was referred, might be discharged, and that the defendant might be ordered to pay to the plaintiff his costs occasioned by the said exceptions, and of this application.

The bill was filed on the 8th of August 1841; the defendant appeared on the 10th; the time for answering expired on the 10th of October. On the day before the time for answering expired, a warrant was taken out to attend the Master. On the 10th he attended before the Master, who refused further time. On the 20th of October an attachment issued for want of answer against the defendant, and on the 26th of October

the defendant filed exceptions to the bill for scandal and impertinence. An order was then obtained by the defendant, referring the exceptions to the Master. All the exceptions were for scandal and impertinence, except one, which was for impertinence alone.

Mr. Girdlestone and Mr. Barker, in support of the application, contended, that the Court would not hear a party who was in contempt, except in cases where he came to clear his contempt, or to resist any proceedings taken against him by his adversary, and to oppose proceedings taken after the contempt, or proceedings which strike at the root of the contempt. If a party be in contempt, he cannot file a demurrer. If he cannot file a demurrer, he cannot, *à fortiori*, file exceptions for scandal and impertinence; but if he may file exceptions for scandal, he certainly may not for impertinence alone. The defendant took out a warrant to attend before the Master, and the Master refused to grant time; the order for reference was obtained as of course. The only order now to be made is, that the exceptions be taken off the file, as having been irregular.

Howard v. Newman, 1 Molloy, 221.

Beavan v. Waterhouse, 2 Beav. 58.

Mr. Romilly, *contra*.—It is said, the defendant, being in contempt, can only come to clear his contempt. That is not so. The case of *King v. Bryant* (1), before Lord Cottenham, proves the contrary. There, the party, being in contempt, was held entitled to be heard, to shew that proceedings against him subsequent to the order placing him in contempt were irregular. If it were the truth, that a person in contempt were not allowed to move, suppose it should happen that both plaintiff and defendant were in contempt, then the cause could not proceed. Most of the cases cited were for impertinence. It is quite clear, you may refer for scandal at any time. It is said, you cannot do so after you have got an order for time; but that is because then the defendant undertakes to answer—*Nedby v. Nedby* (2). In all the cases, a distinction is drawn between scandal and impertinence. In the *Anonymous case* in 5 *Ves.* (3), it was held, that a bill might

be referred for scandal at any time. *Anonymous*, 2 *Ves. sen.* 631. In *Wilson v. Bates* (4), the Lord Chancellor held, that the plaintiff was entitled to sue out an attachment against a defendant for want of answer, although he himself was in custody for a contempt in non-payment of costs.

Mr. Girdlestone, in reply.—The general rule is, that a party, being in contempt, cannot be an acting party in any proceedings in a cause; but there are exceptions to this rule. The question here is, whether the point comes within the principle in *Wilson v. Bates*. There is nothing which should induce the Court to extend the exception to the general rule to a defendant circumstanced as this is. There is nothing entitling him to seek for indulgence from the Court.

The VICE CHANCELLOR.—As to the *Anonymous case* in 5 *Ves.*, it is an authority, so far as it goes, that where the party has taken out an order for time, he is, nevertheless, entitled to take out an order for reference for scandal. In the case of *Wilson v. Bates*, the Lord Chancellor thought there might be cases in which parties must be heard, though in contempt. I could myself put a case: suppose a person were in contempt, and had not taken an office copy, and a fire had destroyed it, must he not be at liberty to apply? For then the question arises, whether the defendant, before he answers, may say, Let me know what I am to answer. I think there is some reason why the defendant may except, although in contempt. My opinion is, on the principle introduced in the *Anonymous case* in 5 *Ves.*, as far as scandal is concerned, the plaintiff may go on for a reference; but if it is only for impertinence, that makes a difference. He may go on for all the exceptions for scandal and impertinence, but not as to the ninth exception, which is for impertinence only. Of course, where there is scandal, that is also impertinent. I cannot give the costs, because there is a degree of authority to warrant the application.

Order, that the defendant shall not go on with the order, so far as the ninth exception is concerned.

(1) 3 *Myl. & Cr.* 191; s. c. 6 *Law J. Rep.* (N.S.) *Chanc.* 151.

(2) 8 *Sim.* 334; s. c. 8 *Law J. Rep.* (N.S.) *Chanc.* 23.

(3) 5 *Ves.* 656.

(4) 3 *Myl. & Cr.* 127; s. c. 7 *Law J. Rep.* (N.S.) *Chanc.* 131.

V.C. }
Nov. 12. } PYM v. LOCKYER.

Will—Restraint on Alienation—Insolvent.

Bequest of an annuity, with a condition that it should be forfeited in case the annuitant should assign or otherwise dispose of in any manner, by way of anticipation, the annuity, which was to be for his sole and personal use and benefit only. The annuitant became insolvent, and the creditors obtained a vesting order on petition under 1 & 2 Vict. c. 110. s. 36:—Held, that the property having been taken out of the insolvent by operation of law, the assignees were entitled to it.

Edmund Lockyer Pym, by his will, dated the 11th of July 1823, gave and bequeathed to trustees, their executors and administrators 5,000*l.*, to be laid out in the funds, and the trustees to apply the interest in the following manner:—40*l.* for his daughter Eleanor for life, and the remainder of the funds, and also the 40*l.*, after the death of his daughter, towards the maintenance and benefit of Edmund L. Pym, his grandson, till he should attain the age of twenty-one. The will then continued—"And from and after my said grandson, E. L. Pym, shall have attained the age of twenty-one years, then and from thenceforth to pay the whole of the dividends and interest of the said last-mentioned stocks or funds, subject to the aforesaid sum of 40*l.*, into the hands only of the said E. L. Pym during his life, or until such forfeiture by him as hereinafter mentioned, and whose receipts alone shall be required as good and necessary discharges for the same; hereby willing, that the said dividends and interest, or any part thereof, shall not be assigned by him, the said E. L. Pym, or otherwise disposed of by him in any manner by anticipation, on pain of forfeiture to go as hereinafter mentioned, meaning the said dividends and interest to be for his sole and personal use and benefit only; and from and after the death of the said E. L. Pym, or such forfeiture by him as aforesaid, and subject to the trusts aforesaid, then upon trust that my said trustees shall stand possessed of the said stocks, funds and dividends, in trust for the benefit of all and every the children of the said E. L. Pym, in manner herein mentioned."

After the death of the testator, the grandson, E. L. Pym, became insolvent, and, while in prison for debt, the Court made an order, under the 36th section of the act for abolishing arrest on mesne process, 1 & 2 Vict. c. 110, vesting the insolvent's property in the provisional assignee, upon the petition of the creditors, the insolvent himself not having applied for the vesting order, under the 35th section of the act, within the prescribed time. The bill was filed for the administration of the testator's estate; and the cause now came on as a short cause, upon further directions, and upon the petition of the insolvent claiming to be entitled to interest upon the sum apportioned in respect of the 5,000*l.* given in trust for him.

The question raised was, whether the vesting order under the act was to be regarded as an adverse process of law, or as the result of the party's own act, and therefore a disposition by him, having the effect of a forfeiture of the bequest contained in the will.

Mr. Wakefield and Mr. Bacon, for the assignees.—Under the will of this testator, there is a strict direction that the life interest of E. L. Pym is not to be assigned away or be disposed of by him; that no act of his should be the means of depriving him of the estate. No person could, formerly, be compelled to take advantage of the Insolvent Act—it was always a voluntary act, for the purpose of escaping from prison; but now, after a certain period, the creditors can have him brought up, and compel him to assign his interest: up to a certain time, his acts are voluntary; after that, he is compelled to act. Now, all the words in this will refer to a voluntary act—his was not a voluntary act; he has, therefore, done nothing to infringe the direction in the will. In *Lear v. Leggett* (1), there was a clause in the will of a testator similar to this, that any alienation of the life interest of a person should operate as a forfeiture; and that in case of alienation, the provision thereby made should devolve on the person next entitled: it was held, that upon the tenant for life becoming bankrupt, his assignees were entitled to his life interest. In the present bankrupt law,

(1) 2 Sim. 479; s. c. 7 Law J. Rep. Chanc. 126.

the debtor is driven to the act which gives the property to his creditor; in other words, it is effected by the Court itself. There is no distinction, in this respect, between the existing law of insolvent debtors and the old bankrupt law.

Mr. Richards and *Mr. Chandless*, for the children of Edmund Lockyer Pym.—The children are now, it is conceived, entitled to all the interest which the testator bequeathed to his grandson. It is quite clear, that if the assignees are to have this property, then the intention of the testator will be disappointed. It is admitted, that if the person had himself taken advantage of the act, the children would not then be deprived of his life interest. In the case of *Shee v. Hale* (2), an annuity was given over, in case of the annuitant in any manner disposing of it. This condition was held to be broken by taking the benefit of the Insolvent Act; and in *Cooper v. Wyatt* (3), a condition of the same sort was held to be broken by the bankruptcy of the annuitant. In the case of *Lear v. Leggett*, which is relied upon by the other side, the Court adopted the case of *Cooper v. Wyatt*, and said, the case then before the Court must be disposed of differently, under the peculiar provisions of the will. When this testator made his will, the old Insolvent Act was in force; and it was, therefore, probably the intention of the testator to guard against this chance of the property being encumbered; and as this is a suit to carry into effect the trusts of the will, the testator's intention must be considered. It is therefore submitted, that the limitation over must take effect.

The VICE CHANCELLOR.—I think the assignees are entitled. This case is not like *Cooper v. Wyatt*. I admit, the testator did not foresee the event which has happened, that there would be another act for the relief of insolvents passed; but still the property has been taken out of the insolvent by operation of law, and the assignees are entitled to what he would otherwise have had.

(2) 13 Ves. 404.

(3) 5 Mad. 482.

WIGRAM, V.C. }
Nov. 5, 9. } HART v. HART.

Lost Deed—Secondary Evidence—Stamp.

In proving the loss of a deed, so as to let in secondary evidence, it is sufficient to negative any "reasonable probability" that anything has been kept back.

To let in a copy of a lost deed as secondary evidence, it is not necessary to prove that the original was duly stamped. The onus of proving the contrary is upon the party raising the objection.

The bill stated, that the plaintiff and defendant were in partnership as wine-merchants up to 1830, and that about that time they agreed to put an end to the partnership; and that a deed was prepared, dated the 1st of March in that year, and executed on the 6th of July following, embodying the terms of the dissolution, as agreed upon at the date of the deed. One of those terms was, that the debts of the concern should be divided into two classes; the first, the good debts, which the defendant was to receive to his own use, paying the plaintiff 2,000*l.* as a consideration for the same; and the second, twenty-six debts, specified in a schedule to the deed, which the defendant was to receive, and, after deducting expenses, &c., was to divide between himself and the plaintiff, in certain specified proportions: that the partnership was dissolved accordingly, and the defendant took possession of the business, &c., and collected the debts. The bill prayed an account, on the footing of that deed. The defendant, by his answer, alleged, that the deed of dissolution was not executed till the July following the date; and that between the date of the deed and its execution it was discovered that four of the debts included in the first class had become doubtful; and that by an agreement, which was reduced into writing and executed by the parties on the same day with the deed of dissolution, it was provided, that the 2,000*l.* should nevertheless be paid by the defendant, and that these four debts should be received by him, and the proceeds divided, as in the case of the debts placed in the second class; and that the plaintiff should account to the defendant for any loss sustained in respect of such four debts. The

answer then alleged the memorandum of this agreement to be lost, but an attested copy was scheduled to the answer. M, the then solicitor of both parties, deposed to the arrangement, the preparation of the original memorandum, its contents, its signature by the plaintiff, in his presence and at his office, and that there were entries in his books, of the same date, to that effect; and that he was convinced that he witnessed the signature of the plaintiff: that, as the defendant's solicitor, he had the custody of the original memorandum till 1831, when he sent it by his clerk Griffiths, at the defendant's request, to his counting-house in Water Lane: that he had never seen it since; and though he had made a diligent search among his papers, he could not find it. Ford, the then and present clerk of M, deposed to the same effect; and it was in evidence, that due search had been made at the defendant's counting-house. It appeared, that Griffiths, who was said to have delivered the lost agreement at the defendant's counting-house, and who had since quitted M's service, was not called to prove the delivery; and no evidence was given that he was dead, or that he could not be found.

Mr. Temple and *Mr. Flather*, for the plaintiff, relied upon the deed of dissolution, and the admission by the defendant that he had received payments on account of the debts in the second class; and contended, that the plaintiff was entitled to an account as a matter of course. The plaintiff denies the existence of the second agreement, and the defendant does not produce it, but attempts to prove a copy of it, under circumstances that he thinks will justify the Court in receiving secondary evidence. First, there is not sufficient evidence that the original is lost; secondly, if there is, the defendant is still bound to shew that the original was duly stamped. The evidence only goes to the execution by the parties.

Mr. Sutton Sharpe and *Mr. Koe*, for the defendant. — The plaintiff should have amended his bill, denying the existence of the second agreement, as that fact was put in issue by the answer. The existence of such an agreement is sufficiently proved. As to proving that it was duly stamped, it is not necessary.

The King v. the Inhabitants of Long Buckby, 7 East, 45.

Crisp v. Anderson, 1 Stark. N.P.C. 35.

They asked a declaration that the accounts may be taken on the footing of the two agreements.

Mr. Temple, in reply. — If the deed were produced, it might appear that it was not duly stamped, and most probably was not. It is rather inconsistent that a party should be in a better situation, by barely alleging that the document is lost.

November 9. — *WIGRAM*, V.C. [after stating the facts disclosed in the bill and answer, proceeded thus:] — This second agreement is not produced. There is evidence by the defendant to prove its loss, and a paper writing is scheduled to the answer, purporting to be an attested copy; and there is also parol evidence of the execution by the plaintiff. The whole of the defendant's evidence is subject to certain objections, on the ground of admissibility; and it is contended by the plaintiff, that even if received, it is insufficient. Upon the last occasion, I expressed my opinion, that if the evidence was receivable, the agreement was fully proved; but I reserved the objections to its admissibility. These objections are two: first, that the loss of the agreement is not so proved as to entitle the defendant to prove his case by secondary evidence; secondly, that the secondary evidence cannot be received, except it is proved that the agreement was duly stamped. I will consider the case as to the stamp first. At the close of the argument, I expressed myself strongly against the objection. Upon the examination of the authorities, I find it laid down by *Mr. Starkie*, vol. 2. p. 770, that previous to the admission of secondary evidence of a deed, it is necessary to shew that the original was properly stamped: he does not, however, refer to any cases. In *Mr. Phillipp's Book on Evidence*, vol. 2. p. 683, it is laid down, that where an unstamped copy is produced in evidence, it may be presumed that the original was duly stamped. *The King v. the Inhabitants of Long Buckby* and *Crisp v. Anderson* may explain the apparent contradiction. *Pooley v. Goodwin* (1) leaves no doubt on my mind. It is manifest, that great injustice may ensue, if the presumption of regularity is not to be

(1) 4 Ad. & El. 94.

raised in favour of a person claiming under a lost deed. The proposition is not that an unstamped copy may be given in evidence, but that the onus of proving the want of a stamp lies on the party who raises the objection. The principle upon which a court of law refuses to receive an unstamped deed has no application.

The second and only remaining question is, whether the loss of the agreement is so proved, as to entitle the defendant to the benefit of the secondary evidence. The evidence of the loss is this: M, the solicitor to the partnership before its dissolution, and of the defendant, and Ford his clerk, prove the execution of the lost agreement on the 6th of July 1830. M. further proves, that he held the agreement for the defendant; that it remained in his possession till January 1831, and then M. sent it by one Griffiths, who was then his clerk, to the defendant's counting-house; and he swears to his belief that Griffiths delivered it. Griffiths is not called, and M. only says, that he has quitted his service; and that search has been made at M's office. That fact is material only as corroborative of the fact that Griffiths removed the document from M's office. It is proved, that the defendant caused due search to be made at his own counting-house, where the various transactions were carried on, and where the plaintiff was in the habit of attending. The objections to the evidence of the loss are twofold. It is first said, that Griffiths ought to have been called by the defendant, to prove a delivery to the defendant; and secondly, that the search by the defendant should have extended to his private dwelling-house. Assuming that Griffiths delivered the agreement in July, it occurred to me in the course of the argument, and gives great weight to the second objection, that the defendant's clerk, who was actually concerned, and who gives important evidence in the cause, never says he saw the agreement in the counting-house where the search is said to have been made. If it was kept there after it was received from Griffiths, it is scarcely possible that the defendant's clerk should not have known of it. The justice of the case requires that I should refer it to the Master to inquire what has become of the agreement of the 6th of July 1830. The language of the reference will give the opinion of the Court that some

agreement has been signed. I quite concur with what was said in *M'Gahey v. Alston* (2), that in order to let in secondary evidence of a lost deed, it is not necessary to negative every possibility; it is sufficient to negative every reasonable probability that anything has been kept back.

Further directions and costs reserved.

V.C. }
Nov. 12. } BARTLETT v. BARTLETT.

Devise—Restraint on Alienation—Remoteness.

A testator devised to his four sons, in trust to pay an annuity to his widow, and, on her death or second marriage, to divide equally between his said sons and his two daughters; and on the decease of either of his sons or daughters, or the children of his sons or daughters, then to their children; and in case any person becoming entitled to his property, should attempt to sell it, then he should forfeit his share:—Held, that the first takers, the children of the testator, each took his share absolutely, subject to the annuity.

This suit was instituted for the administration of the will of Edward Bartlett, dated the 24th of January 1820, who devised and bequeathed to his four sons all his freehold and leasehold messuages or tenements, lands and estates, wheresoever; to hold to them, their heirs, executors, administrators, and assigns for ever, in trust, in the first place, to pay and allow unto his wife, the sum of 200*l.* a year for her life, to be paid quarterly; but upon the decease or second marriage of his said wife, the testator directed his said trustees equally to divide all and singular his rent and monies at interest in the stocks, and mortgages, every quarter or half-yearly, as it became due, between his said sons and his two daughters, Elizabeth Cook and Mary Ann Bartlett, and Edward, John, Thomas, and William Bartlett, in equal shares or proportions, an equal share each. The testator continued: "And it is my express will and meaning, that my two daughters shall receive their shares, (apart and independent from their present and any future husband,) to their executors, administrators,

(2) 2 *Moo. & Wels.* 214; *s. c.* 6 *Law J. Rep.* (N.S.) *Exch.* 29.

and assigns; and upon the decease of either of my said sons, or either of my two daughters, or the children of my said sons or daughters, I direct that this, their share and interest of and in the said estates and money at interest, may go and belong to his or their children; but, in case any of the persons who shall take, or to whom all or any part of my said estate may descend, by virtue of this my will, shall at any time offer their share or dividend either for sale or mortgage, then I direct the above bequest with respect to him, or her, or them, to be null and void, and his or her part or share to go and be divided in equal portions among those who never offered their share or part to sale or mortgage, it being my will and meaning, and express injunction, that no part of my said estate shall ever depart or go out of my family; and it is my express will, that no debtors or creditors, on any bankruptcy of theirs, shall have any power to offer for sale any part of my estates, or money at interest or mortgage, for no debts as they shall contract upon their own account."

The cause came on as a short cause; and the question now raised was, whether the children of the testator took their shares absolutely, or only for life.

Mr. Girdlestone, Mr. Spence, Mr. Wilbraham, and Mr. Wood, for the different parties interested.

The VICE CHANCELLOR.—It is clear this is the will of a most illiterate person. There is first a devise to his four sons, in trust to pay an annuity to his widow, and, on her death or second marriage, to divide all and singular his rents and monies between his said sons and his two daughters; and on the decease of either his sons or daughters, or the children of his sons or daughters, then to their children; that is an express gift to the unborn children of the unborn children of his sons and daughters; and then he continues, "in case any person who shall become entitled to any of the property shall attempt to sell it, then he shall forfeit his share." It is plain, the testator had an idea he could give the property, so as it might perpetually descend. I think there is an implication that the first taker should take absolutely.

Decree—That according to the true con-

struction of the will of Edward Bartlett, the testator, the six children of the said testator named in his will, and living at the time of his death, became each of them absolutely entitled to one-sixth part or share of the residue of the personal estate and effects of the said testator, subject to the payment of the annuity of 200*l.*, by the said will directed to be paid thereout to the widow of the said testator, during her life.

V.C. }
Nov. 15. } BRYDGES v. BRANFIL.

Practice.—Witness—Amending Depositions.

Leave given to amend the return of commissioners to examine witnesses, by adding thereto a certificate, that the commissioners and their clerks had taken the usual oaths before the proceedings under the commission were commenced.

Mr. Bethell and Mr. Hubback moved on the 10th of August last, on behalf of the plaintiffs, that the commissioners who acted under a certain commission for the examination of witnesses in the cause, bearing date the 9th of September 1840, and which commission was executed at the city of Canterbury, on the 6th and several subsequent days of October 1840, might be at liberty to amend their return to the said commission, by adding thereto a certificate that the said commissioners did previously to swearing or examining any witness or witnesses under the said commission, take the oath first specified in the schedule, to the said commission annexed; and that all and every the clerks and clerk employed in writing, transcribing, or engrossing the depositions of witnesses examined by virtue of the said commission, did, before they or he were permitted to act as clerks or clerk, as aforesaid, or to be present at such examination, severally take the oath last specified in the said schedule, and that the said commission and all proceedings thereunder, might be taken off the file, and delivered to the said commissioners, or any one of them, for the purpose of being so amended, and when so amended, might be refiled.

This motion was opposed on behalf of the defendants, and was ordered to stand over,

in order that search might be made for precedents; and on the 15th of November last, the cases of *Dixie v. Dixie*, (May 4, 1702), *Chapman v. Chapman*, (June 26, 1712), *West v. Yerbury*, (December 19, 1713,) (1), were produced, copied from the register's book, in support of the motion, accompanied by a certificate of all the commissioners, that the proper oaths had been taken before the commencement of the proceedings under the commission.

Mr. Wakefield, Mr. Richards, and Mr. Stinton, contra, urged the length of time elapsed since the last of the precedents cited, which was 127 years ago; that a contrary practice had prevailed since that time; and the proper course was now to have the deposition taken over again, on the ground, that it did not appear upon the proceedings, under the commission, that the commissioners were qualified to act—*Campbell v. Dickens* (2), where depositions were ordered to be suppressed, on the ground of being wrongly described, as having been taken by virtue of a commission issuing out of the Court of Chancery, and no counsel's name being affixed to the interrogatories.

The VICE CHANCELLOR. — When the matter was first before me, I thought that on motion to suppress the depositions, it would be a matter of course. I decided that in the case of *M'Kellar v. M'Kellar* (3), which was an application to suppress depositions, and thought then, that it would be extremely harsh not to allow a thing to appear to be right, which was, in fact, right. It occurred to me, that for many years amendments had been allowed in common practice, and that there must be precedents in this court of such amendments. It does not follow, that these produced are the only precedents, but I think they are sufficient authority upon the point; I am bound to set that right in appearance, which is known to be right in point of fact, and shall make the order in the terms of the notice of motion.

Note.—May 4, 1702.—*DIXIE v. DIXIE*.—Whereas upon the humble petition preferred to the Right

(1) See these cases in the note.

(2) 3 You. & Col. 720; a. c. 9 Law J. Rep. (n.s.) Ex. Eq. 83.

(3) Not reported.

Honourable the Master of the Rolls, the first instant, shewing, that on Tuesday the 5th day of February last, a commission for examination of witnesses, was executed in this cause, at the house of Judith Matthews, widow, in Market Bosworth, in the county of Leicester, wherein the defendants joined, and examined one witness, and cross-examined most of the defendants' witnesses, and the commissioners on both sides, signed and certified the commission, and the interrogatories and depositions on both sides, and the defendants' commissioner brought the commission up to London, and delivered the same into court. That upon opening the commission, it appeared that the clerk who took the depositions, through inadvertency, omitted to set down the day of taking the depositions in the title thereof, and only mentioned the same to be taken at the house of the said Judith Matthews, which being not taken notice of by the commissioners, the same was, with that omission, certified and returned into court; wherefore, and for that it appeared by the certificate of the commissioners, and affidavit thereto annexed, that the execution of the commission was begun on the day aforesaid, and continued four days, it was prayed that the said mistake might be rectified, and the day of the month and year of our Lord, inserted therein, and the record amended accordingly, which was ordered accordingly, unless cause on this day. And the clerks in court on both sides this day attending, and the defendants' clerk in court consenting that the said mistake should be rectified, his Honour, on hearing the said petition read, doth order that the said mistake be rectified and amended, and that between the word "taken," and the words "at the house of Judith Matthews, widow," in the title of the said depositions, be inserted the words, viz. [on Thursday the 5th of February, in the thirteenth year of the reign of our Sovereign Lord William the Third, by the Grace of God King of England, Scotland, France, and Ireland, Defender of the Faith, and Anno Domini, 1701,] and that the plaintiff's six clerk do insert the same, and amend the same accordingly.—A. 1701, fol. 271, E. G., T. Collis, R.

June 26, 1712.—*CHAPMAN v. CHAPMAN*.—Upon motion this day made unto this Court, by *Mr. Carter*, being of the plaintiff's counsel, in the presence of *Mr. Brown*, being of the defendant's counsel, it was alleged that the commissioners for examination of witnesses in this cause, have in the commission by them executed, omitted the name of William Carpenter, examined as a witness at the plaintiff's commission, with his place of abode and age. That this cause is set down to be heard before his Lordship, on the 4th of July next, but the plaintiff cannot be prepared for hearing on that day. It was therefore prayed, that the commissioners for the examination of witnesses in this cause, may amend the plaintiff's depositions, by inserting the name, age, and place of abode of the said William Carpenter; and that the cause may be adjourned over to be heard some time after the term, whereupon and upon hearing of what could be alleged on both sides, it is ordered, that this cause do stand adjourned over to be heard on the fourth day of causes, after this term; and that in the meantime, the plaintiff's commissioners be at liberty to amend

the said commission, by adding the name, age, and place of abode of the said William Carpenter thereunto.—J. Collis, R.

December 19, 1713. — *WEST v. YERBURY.* — Whereas by an order of the 19th of November last, for the reasons therein contained, it was ordered, that the depositions taken in this cause, on the part of the plaintiffs, at Bridgewater, in the county of Somerset, on the 11th of September 1711, should be discharged, and that the plaintiff West, or Mr. Joseph Dancy, the minister of Barton St. David's, in the said county, or one of them, should produce the register-book of the said parish, at the hearing of this cause, unless the plaintiff West and the said Dancy, having notice thereof, should, at the second general seal after the last term, shew unto this Court good cause to the contrary. Now upon opening of the matter this present day, unto the Right Honourable the Lord High Chancellor of Great Britain, by Mr. Attorney General, Mr. S. Pratt, Mr. Fortescue, and Mr. Mead, being of the plaintiffs' counsel, who came to shew cause against the said order, in the presence of Mr. Samuel Hooper, Sir Peter King, Mr. Vernon, and Mr. How, being of the defendants' counsel, it was so alleged, that the said commission was regularly executed at Bridgewater, and afterwards adjourned to Shepton Mallett, in the said county of Somerset, where Abigail Provis and Hester Hodges were duly sworn and examined, by virtue of the said commission, on such adjournment, the 14th day of September, as witnesses on the plaintiff's behalf, as by the affidavit of the plaintiff's commissioners, and the clerk who attended the execution of the said commission, appears. But the commissioners having by mistake omitted to indorse on the commission or depositions taken by virtue thereof, that the same was adjourned to Shepton Mallett, the defendants endeavoured to procure the said Provis and Hodges, who are very old women, to make affidavit that they never were at Bridgewater in their lives, nor examined at the said commission on the plaintiffs' behalf, and had procured affidavits that the said Provis and Hodges had so declared, and thereupon obtained the said order of the 19th of November, for suppressing the said depositions. And as to the register-book required by the defendants to be produced, the same (if any such there be) was that which was kept in the late Great Rebellion, and never was in the custody of the said Dancy, or ever seen by him, as by his affidavit appears; nor did the plaintiff West nor his agent Mr. Symons, ever see any such book, or use any endeavours to have the same concealed, as by their affidavits appear; and therefore it was prayed that the said order of the 19th of November may be discharged; whereupon, and upon hearing of the defendants' counsel, and reading several affidavits, and hearing what was alleged on both sides, his Lordship allowed the cause now shewed, and doth order that the order of the 19th of November last be discharged, and that the plaintiff's commissioners, or either of them, be at liberty to amend the said commission or depositions taken by virtue thereof, by indorsing or inserting that the said commission was adjourned to Shepton Mallett. —B. 1713, fol. 94, P, J. Collis, R.

M.R. } KING v. HAMMETT.
Nov. 19. }

Practice.—Creditors' Suit—Costs.

A simple contract creditor filed a creditors' bill, after being correctly informed by the administratrix of the intestate of the state of the accounts, and that judgment creditors would consume all the assets. The plaintiff was ordered to pay the costs.

This was a bill by a simple contract creditor, on behalf of himself and all other creditors of Edward Hammett, deceased, intestate, against his administratrix. The administratrix by her answer stated, that the intestate died insolvent; that the whole of his assets did not exceed the sum of 200*l.*, and were not sufficient to pay and satisfy the debts which were due and owing by him at the time of his death; that these debts, amongst others, consisted of 60*l.*, which was due for rent, and the sum of 149*l.* due to one Mrs. Treby, to secure which, she had, since the death of the intestate, executed a warrant of attorney to enter up judgment, which had been entered up for 300*l.*; that the rent due and the judgment debt, and the funeral and testamentary expenses of the intestate, greatly exceeded in amount the whole of his assets. The defendant then stated, that the plaintiff and his solicitor had notice of the insolvency of the intestate's estate previous to the commencement of the suit; and that there were no assets of the intestate to satisfy the plaintiff's debt; and that after the bill was filed, and before the answer was put in, she caused her solicitor to represent to the plaintiff that such was the state of things, and to offer him an examination of the administration accounts. The defendant set out in her answer, and the schedules annexed to it, a full account of the estate and debts of the intestate, and of her receipts and payments, whereby it appeared, that after payment of the funeral and testamentary expenses of the intestate, and of the sum of 60*l.*, there only remained the balance of 91*l.* 12*s.* 8*d.*, which the defendant admitted to have in her hands. The sum of 91*l.* 12*s.* 8*d.* was paid into court, and by the decree, the usual accounts were directed.

The Master, by his report, found that

there was no balance due from the defendant, and allowed her account.

On the cause coming on for further directions,—

Mr. Kindersley and *Mr. Lewis* insisted, that the plaintiff ought to be paid his costs out of the fund in court, and that he had a right to prosecute his suit, for the purpose of obtaining from the defendant, upon oath, particulars of the assets of the intestate, and of restraining her from giving preferential judgments.

Mr. Pemberton and *Mr. Glasse* contended, that, under the special circumstances of this case, the plaintiff, instead of being allowed any costs, ought to pay them; that the information and account which he had obtained from the defendant by her answer, and by her examination before the Master, were the same as had been rendered to him immediately after the bill was filed; that the defendant had a right to give a preference to any of the creditors of an equal degree, before the decree was obtained against her. In support of the argument as to the costs, they cited—

Barker v. Wardle, 2 Myl. & K. 818.

Anon. 4 Madd. 273.

Bluet v. Jessop, Jac. 240.

Robinson v. Elliott, 1 Russ. 599.

THE MASTER OF THE ROLLS, after detailing the facts, said, that it was much to be regretted, that the plaintiff had prosecuted this suit, by which he has obtained no information beyond what had been given before its institution. That where a creditors' suit was properly commenced by a simple contract creditor to realize assets, and the assets were realized, but found insufficient to pay the specialty debts, and consequently the plaintiff obtained nothing for himself, still he would have his costs. But the present was not a suit of that nature, for it was not properly commenced nor prosecuted. In the present case, the specialty debt was not denied, nor was the Master's report questioned. The plaintiff had not only had an account rendered to him of the assets of the intestate, but he was invited to inspect the books from which the account was made out. A creditor proceeding under such circumstances, not only ran the risk of not having his own costs paid to him, but of being compelled to pay the costs of other parties.

The answer of the defendant was, in all respects, correct; and even if there had been no recognized principle for him to act upon, he should have thought it right to take care that justice should be done; and had no hesitation in making the plaintiff pay the costs of the suit; the defendant to have her extra costs out of the fund in court, and the residue to be paid to the judgment creditor in part satisfaction of her debt.

M.R. }
Nov. 25. } JONES v. COOKE.

Practice.—Two Suits for same object.

Where a decree, for the administration of a testator's estate, was obtained in a creditors' suit, which decree did not bind the testator's real estate, the Court refused to prevent a second suit, for the administration of the estate of the same testator, from being prosecuted.

This was a motion by the defendant, as executor, after a decree for an account of the real and personal estate and effects of the testator, in the suit of *Kynaston v. Jones*, to restrain a creditor from prosecuting a suit of *Cooke v. Jones*, in which a bill had been filed, but no answers had been put in, or further proceedings taken.

Mr. G. Turner and *Mr. Crawford*, in support of the motion.—It is well established that a creditor shall not be allowed to proceed in this court, or at law, against an executor, for the recovery of a debt which was due by the testator, after a decree for the general administration of the testator's effects. This Court will protect the estate from a multiplicity of suits, and the confusion of different decrees or different orders.

Mr. Pemberton and *Mr. Bayley*, contra.—The decree on which the plaintiff's motion is founded is imperfect, and does not bind the realty, as one of the defendants in that suit was an infant, and there was no debt proved against him at the hearing of the cause—*Lechmere v. Brasier* (1). Nothing is better settled than that, where this Court has made a decree for the administration of assets, it has been in the habit of enjoining a creditor from prosecuting another suit for the same

(1) 2 Jac. & Walk. 287.

purpose; but the principle on which the Court has acted in these cases, is to allow the second suit to proceed when the first is so constituted as to be ineffective or insufficient in its relief. Here the decree is only good against the personal estate.

Mr. Turner, in reply.—The plaintiff is trustee by devise of the real estate of the testator; and is competent to sell, and give discharges for the proceeds of the same, and for the rents and profits of such estate; and by the 30th new rule of the 26th of August 1841, he may represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as an executor or administratrix, in suits concerning personal estate, represents the persons beneficially interested in such estate. And that order takes effect as to all suits, whether now depending or hereafter commenced. The infant devisee is not therefore a necessary party for the purpose of obtaining a good decree against the real estate of the testator.

The MASTER OF THE ROLLS said, that the order which had been read was not applicable to this case, in which a decree had already been obtained. That decree did not bind the real estate of the testator; and although, in cases of this sort, it was quite proper to protect the estate from being wasted by two suits, when a decree had already been pronounced in one of them, still he could not restrain the defendant from prosecuting his bill; as the relief to be obtained under the decree was not so extensive as that which he prayed for. Under these circumstances, his Lordship refused the application.

K. BRUCE, V.C. }
Nov. 18. } CLARK v. WILMOT.

Official Assignee—Disclaimer—Costs.

An official assignee in a foreclosure suit, claiming by his answer no interest, except such, if any, as was vested in him as official assignee, and disclaiming at the bar, is entitled to costs.

The bill in this case was filed by a mortgagee, for the purpose of establishing the

priority of his security, against the mortgagor, the official assignee of another incumbrancer who had become bankrupt, and a party to whom this incumbrancer had assigned his security by way of mortgage.

The official assignee put in an answer, claiming no interest in the mortgaged estate, except such, if any, as was vested in him as official assignee.

Mr. Bellamy, for the official assignee, disclaimed at the bar all interest in the suit, and applied for his costs. He cited—

Peake v. Gibbon, 2 Russ. & Myl. 354; s. c. 9 Law J. Rep. Chanc. 168.

Woodward v. Haddon, 4 Sim. 606; s. c. 1 Law J. Rep. (N.S.) Chanc. 106.

Mr. C. P. Cooper opposed the application, on the ground that the assignee had by his answer asserted a claim to the premises in question.

KNIGHT BRUCE, V.C.—The assignee has not disclaimed by his answer, but he has at the bar. I think his answer a very proper one. He had no personal knowledge of the matter, but having heard the matter now discussed, he has disclaimed. I think he should be dismissed, the plaintiff paying him his costs, with a reservation as to the party on whom they are ultimately to fall.

V.C. }
Dec. 9, 10. } EMERY v. NEWSON.

Practice.—21st Order of August 1841—Infant.

The 21st Order of August 1841 is not applicable to the case of an infant defendant.

Mr. Jeremy moved *ex parte* for leave to file a note at the Six Clerks Office upon the clerk in court for an infant defendant, under the 21st of the Orders of August 1841, such infant defendant not having put in his answer within the time allowed; and stated, that a doubt had arisen whether the 21st order applied to the case of an infant defendant, but submitted, that the answer of an infant was tantamount in its effect to a traverse of the plaintiff's bill, it putting him to proof of his case; and that as the same course must be pursued on a note being filed under the order in question, the infant could not be damnified; and therefore, that such

order might, perhaps, reasonably be construed to extend to the case of an infant. No exception, however, was made by this order to the case of infants, although such exception was contained in the 23rd of the Orders of the same date, relating to another subject.

The VICE CHANCELLOR said he would confer with some other Judges of the Court before he decided the case. On the 10th of December, his Honour said—When this case was mentioned to me, I thought that the 21st order was not intended to apply to the case of an infant defendant. I have now had an opportunity of ascertaining the opinion of Lord Langdale, the Vice Chancellor Wigram, and another learned gentleman at the bar, and find the intention of those who framed the orders was, that it should not apply to the case of an infant defendant; therefore, I must take that to be the true construction of the 21st Order.

K. BRUCE, V.C. } HELSHAW v. LANGLEY.
Nov. 18. }

Specific Performance—Signature of Agreement.

An agent, not being able to write, held the top of the pen while another person wrote his name to an agreement:—Held, a sufficient signature.

In this suit, which was instituted for the purpose of enforcing the specific performance of an agreement entered into by the agent of the defendant with the plaintiff, a point arose as to the sufficiency of the signature of the agreement by the agent of the defendant.

It appeared on the evidence, that the agreement had been drawn up in writing by the plaintiff; that the agent of the defendant, who could not write, said, "My daughter will sign it for me," and that his daughter accordingly signed it in his name, he holding the top of the pen as she was writing.

Mr. Teed objected, that this was not a sufficient signature; but—

KNIGHT BRUCE, V.C., held, that it was sufficient.

NEW SERIES, XI.—CHANC.

Mr. Swanston and Mr. Anderdon, for the plaintiff.

Mr. Teed and Mr. Dickinson, for the defendant.

K. BRUCE, V.C. } CUNNINGHAM v. PLUNKETT.
Nov. 22. }

Practice.—Advancing Causes.

Where, on the hearing of a cause, a decree is taken merely for the purpose of establishing facts against infants and femes covertes, defendants, the Court will allow the cause to be put in the paper as soon as the record is in a proper state.

Several of the defendants in this suit being infants and married women, before the points in this case could be discussed, it was necessary to establish several facts against them in the Master's office. A decree was accordingly taken for that purpose.

KNIGHT BRUCE, V.C., said, he would hear the cause as soon as the Master's report was made, and the record was in the proper state. He thought he should not do any injustice in giving the cause priority to the other suits. Counsel might make a memorandum of what he had said on the subject, and when the cause was fit for hearing, apply to him to have it put in the paper.

WIGRAM, V.C. } DUNCOMBE v. DAVIS AND
Nov. 24, 25. } OTHERS.

Practice.—Exceptions—Amendment after Answer—Discovery—Materiality—Title Deeds.

On a reference of exceptions for insufficiency of an answer to an amended bill, the Master is bound to look at the original record to see if the exceptions relate to the old matter.

Generally, a plaintiff amending after answer, cannot except as to any matters contained in the original bill; but, "upon special application," leave may be given, on the ground of mistake—Glassington v. Thwaites, 2 Russ. 458; or that an entirely new case is made by amendment—Mazarredo v. Maitland, 3 Madd. 66. Amending the prayer

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by asking specific relief, which would have been covered by the general relief prayed in the original bill, will not bring the case within the exceptions to the rule.

Bill against A, grantee, B, assignee, and C. & Co., depositors, to set aside an annuity deed, which, with other documents, had been deposited by B. with C. & Co., as security for his banking account. The bill seeking a discovery from B, and that he might set forth a list of such other securities as C. & Co. held applicable to B's debt, and a statement of B's banking account at the time of and since the deposit of the annuity deed, and praying that such other securities might be first applied; it was held, upon exceptions, that B. could not by his answer decline to set forth such list, on the ground, that they were his title deeds, nor to give such statement of his banking account.

The plaintiff in this case was the acceptor, &c. of various bills of exchange, and the grantor of an annuity; and the defendants were Pennell, to whom the bills were given, and the grantee of the annuity; Davis, the assignee of the annuity, and Messrs. Scott, as depositors of the annuity deed and the assignment to Davis. It appeared by the bill, that the plaintiff had had various bill transactions with Pennell, on which he had become liable to a large amount, but for a large portion of which bills he had received no consideration. That by a deed of December 1834, reciting the different transactions, and that the plaintiff was indebted thereon to Pennell to the amount of 4,150*l.*, in consideration thereof, plaintiff granted to Pennell an annuity of 415*l.*, for the life of the plaintiff, and charged the same on a reversionary interest in certain freehold and copyhold lands. This annuity was assigned to Davis in March 1835, and the annuity deed and the deed of assignment (together with other deeds and securities) were, in December 1837, by him deposited with the Messrs. Scott, as a security for his banking account. This was a bill to set aside the annuity, and, after charging that the annuity was void, and that the consideration for the assignment to Davis was merely colourable, and that the Messrs. Scott had notice, it proceeded to charge as follows:—"That whether Messrs. Scott were or were not in advance to the said Davis, upon the said

deposit, and whether they had or had not such notice as aforesaid, yet they have in their hands or power other securities [of considerable value and amount,] from the said Davis, and other deeds and documents of and by way of security from the said Davis, besides the deed of December 1834, and the said assignment of the 27th of March 1835, as security for and applicable to the discharge of, and more than sufficient to pay and discharge what may be due from the said Davis, to them, the said Messrs. Scott, upon the said deposit, and which ought first to be applied for the purpose of paying and discharging the same; [and the said defendants Davis and Messrs. Scott ought to set forth a list, and short description of all such other securities, and deeds, and documents, and the amount and value thereof respectively.]"

The interrogatory upon this charge was, "Whether the said Messrs. Scott, or one and which of them, have not, or has not in their or his hands or power, some and what other securities, and other deeds and documents, by way of security from the said Davis, besides the said deeds of December 1834 and March 1835, as security for, and whether or not applicable to the payment and discharge of, and whether or not more than sufficient to pay and discharge what may be due from the said Davis, to them the said Messrs. Scott, upon the said deposit." The bill prayed, that the annuity might be declared void, and the deed delivered up to be cancelled; [and, that if it should appear that Messrs. Scott were entitled as against the plaintiff, to any charge upon the annuity, then that the other securities deposited by Davis with the Messrs. Scott, might be first applied in discharge thereof, or that the plaintiff might be at liberty to redeem them.]" The sentences within brackets in the charge and prayer, were added by amendment. The defendant Davis put in his answer to the original bill, and admitting the existence of such documents, declined to set forth a list. The plaintiff excepted, and the Master disallowed the exception. The bill was then amended in the particulars before mentioned. The defendant again refused to answer, and exceptions were taken and disallowed by the Master, and exceptions were then taken to his report.

Mr. Temple and *Mr. E. Montagu*, for the exceptions.—The plaintiff has an equity to redeem the other securities in the hands of Messrs. Scott, and therefore this discovery is material to the relief prayed.

Mr. Spurrier, *contrà*.—This should have been worked out by the exceptions to the original answer, which admitted the existence of such documents, but refused to disclose them. Exceptions were taken to that answer, on the ground, that the defendant had not set forth the particulars of the documents. This being the subject of an old exception, cannot be made the subject of a new exception. But the defendant is not liable to set forth these documents, as they constitute his title.

[WIGRAM, V.C.—The plaintiff claims a right to have these very documents first applied in satisfaction of Messrs. Scott's debt.]

That must be done in an independent suit. The discovery is immaterial as between the plaintiff and Davis in this suit. If it is supposed to be material, yet the materiality is too remote.

Dos Santos v. Frietas, Wigram on Discovery, 72.

Francis v. Wignell, 1 Madd. 258.

Besides, how is the defendant to set forth a list or short description? Is he to give the contents? or the dates and names of the parties? In either case, it might be dangerous to his title, and the Court will protect him from a discovery.

WIGRAM, V.C.—The plaintiff states as a case for relief that the annuity deed has got into the hands of the bankers, who hold it as a security for the banking account of Davis; the bankers are the mortgagees, and they and Davis make up a perfect ownership. The plaintiff says, as against Davis, he is entitled to have it cancelled; that if Messrs. Scott hold other securities, he has a right to insist that if those other securities are sufficient to satisfy their debt, they should give him up his deed, free from incumbrances. This is a common equity, and the case, if made out, would entitle the party to relief. Suppose the relief specifically prayed, am I not bound to hold, that all material discovery from the defendant, must be given in this stage of the cause? The old rule of the Court was, even in my recollection, and so Lord Eldon laid it down, that if a bill prays

relief, and the defendant thinks the plaintiff is not entitled to it, if he would avoid giving a discovery, he must either plead or demur; if he chooses to answer, he submits to have it considered as a case in which relief may be given at the hearing. That rule is laid down, to avoid the inconvenience of hearing a cause on the merits upon exceptions. The rule is narrowed at present, but only with reference to certain well known excepted cases. The first point made was, that the defendant was a purchaser for value without notice; but the discovery asked, was not relating to the annuity deed, but to the other securities, which the plaintiff says he is entitled to have applied in satisfaction of the demand, if the annuity deed has been so dealt with, that it cannot be got at without. Next, it was said, that the deeds called for, were documents relating to title. I may observe, that if that defence were available, I do not know how any person would get any documents at all. Suppose a bill to recover an estate; the plaintiff is entitled to recover the deeds relating to the estate; they are the very things he wants to get; they are the deeds of the property to which he claims a right. If a defendant might say, "I will not tell you whether I have them or not;" if he might put in a short answer, saying, "I claim them as my title deeds," the plaintiff would be deprived of all relief. I cannot allow that argument to be sufficient. With regard to the discovery being too remote, how can that be, when the documents relate to property to which I have a title? If the defendant puts in an answer, he ought to give a short description of the documents, that the Court may judge whether there is a reason why it should not call for their production. Unless the defendant is protected, on the ground of form, he must answer as to these documents.

Mr. Temple, in reply, as to the objection of form. The Master's former judgment is not conclusive; for the Court has again referred it to the Master to report whether the answer to the *amended* bill was sufficient.

[WIGRAM, V.C.—Is the Master bound to exclude from his consideration the former bill and answer?]

Still, the case made by the amended bill is a new case, and new relief is prayed; and the plaintiff is entitled to have an answer to

the amended bill, even though some of the matters interrogated to, were contained in the original bill—*Mazarredo v. Maitland* (1).

November 25.—WIGRAM, V.C. — The question which I reserved for my consideration was this: the plaintiff filed his original bill, and an answer was put in, to which exceptions were taken, and the only material one was overruled. The plaintiff submitted to that decision, the effect of which was to render the answer sufficient. The bill is amended, and exceptions are taken to the answer to the amended bill: as to this particular exception, the Master has reported the answer sufficient, and exceptions are taken to his report. Now, the exception referred to the Master applied to a particular charge in the original bill—[his Honour here read the charge]; and an interrogatory was founded upon this, whether the Scotts had not in their possession some, and what documents, &c. The defendant insisted, by his answer, that he was not bound to answer what, if any, documents he held of that description: the Master held, that he was not. The plaintiff submitted, and amended, and introduced the words, “of considerable amount and value;” and at the conclusion of the sentence these words, “that he ought to set forth a list and short description,” &c. I have not the least doubt of the practice in cases in which the plaintiff has amended his bill after answer, and afterwards taken exceptions to the amended answer, upon interrogatories contained in the original bill. Where the plaintiff amends his bill, he admits the first answer to have been sufficient, and cannot afterwards except to the same matter which he had not excepted to in the answer to the original bill. There are some special exceptions to the rule, as where he merely amends by correcting the spelling of a name, or by adding a party. I was very much pressed that this was not the practice, because, the Court having made an order referring the exceptions, it was said the Master was bound to consider them with respect to the record *as amended*, and was not bound to look at the original record. Being anxious that there should be no difference of practice in the courts, I have looked at the authorities. In the case of

Ovey v. Leighton (2), the very point was directly before the Court. It does not appear that the precise point was much argued: but it is worthy of observation, that Mr. Bell admitted that such was the practice. The next case is *Glassington v. Thwaites* (3). That was an extremely special case. The defendant, when called upon to answer the original bill, put in what was called an answer and disclaimer, which was, in fact, a disclaimer of his own liability; the plaintiff did not except, but amended his bill; and, according to the ordinary practice, that was an admission that the answer was sufficient: the plaintiff excepted generally to the amended answer, and the Master held it sufficient. Lord Eldon, proceeding upon the apparent mistake, made an order to the Master to consider the exceptions, as if the matters to which they related had not been contained in the original bill. The very form of the order shews that without that order it could not be done. In *Irving v. Viana* (4), the plaintiff was held entitled, under the special circumstances, to have an answer to his amended bill, though he had treated the former answer as sufficient; but before he took that course, it was held, that he ought to have made a special application to the Court for leave to do so. The Master then, in considering whether an answer to an amended bill is sufficient, is bound to consider what took place in the original cause. But, it is said, a new case is made; and *Mazarredo v. Maitland* was relied upon. But there, a totally different case was made by the amended bill; and consequently, that case falls within the exception to the rule. Mr. Daniel, in vol. 2. of his *Chancery Practice*, p. 302, has collected all the cases, and commented upon them in an able manner. *Prima facie*, I think the plaintiff has waived his right to call for an answer to the charge in the bill, and the interrogatory founded thereon. The question then is, has the plaintiff made a new case, so as to bring himself within the exceptions to the general rule? The two points said to make the distinction between the two bills are, first, the difference in the charge of the bill; and secondly, that the prayer of the amended

(2) 2 Sim. & Stu. 234.

(3) 2 Russ. 458; s. c. 3 Law J. Rep. Chanc. 112.

(4) M'Clel. & Y. 563.

(1) 3 Madd. 66.

bill is for specific relief as to these securities to which the interrogatory applies, whereas the original bill was not. First, does the alteration in the charge make any difference? Certainly not, in this case. What means have I of knowing that any such documents have any existence, except from the original answer itself? The plaintiff, in the original bill, called upon the defendant to set forth whether any such documents existed. The defendant, by his original answer, insisted he was not bound to produce them. The amended bill only asks for circumstances relating to documents which, by the proceedings in the original bill, the plaintiff has admitted that the party is not bound to produce. If that were allowed, the rule above stated would be a nullity, because the plaintiff would only have to add an interrogatory as to these circumstances to effect his object. If it is admitted that the defendant is not bound to tell you what documents he has, can I compel him to set forth a list of them? The only other question is, whether the prayer for specific relief makes any difference. I asked whether the original bill contained a prayer for specific relief, as the materiality of the exception is always treated by considering what is material, if the bill were true. As there was no prayer for specific relief, I am now obliged to consider whether the plaintiff could have had this relief under the general prayer. The bill alleges, that the deed in question is invalid as between Davis and the plaintiff, and also as between the plaintiff and the bankers; but, seeing that a different case may exist between Davis and the bankers, it charges, that if the deed is valid as between the plaintiff and the bankers, the bankers ought first to apply to the payment of their debt those securities held by them in which the plaintiff has no interest, so as to leave the annuity deed open to the contest between Davis and the plaintiff. The bill containing that charge, the plaintiff is not able to get from Davis a discovery of the documents which the bankers hold: but the plaintiff may succeed in proving at the hearing, or in an inquiry, what those documents are. If the Court were of opinion that the security was void, it would make a decree against Davis to deliver it up. But suppose the Court of opinion that the bankers have a right to hold it, yet they have two securities,

in one of which the plaintiff has no interest; the Court may decree, that the bankers shall first apply that security in which the plaintiff has no interest, in order to liberate the annuity deed. The Court must, at the hearing of the cause, decree that to be done, if the law entitles the plaintiff to have it done. If the case in the bill be proved, the prayer for general relief would entitle the plaintiff to this particular relief. Whether the plaintiff can have this case referred back to the Master or not, must be the subject of a special application.

The original bill charged, that the Messrs. Scott had not advanced any money to or for, and were not at all in advance to the said Davis, upon the deposit of the said deeds or instruments; and by amendment, it was added, "and so it will appear, if the said Davis shall set forth (as he ought to do), what was the balance upon the banking account of the said Davis with the Messrs. Scott at the time when the said deposit was made, and from whom and to whom such balance was due, and an account of all sums of money since that time paid by the said Messrs. Scott to, or for, or on account of the said Davis; and an account of all sums of money since that time received by the said Messrs. Scott from or on account of the said Davis, and the times when, and to, and from whom such sums of money respectively were paid and received." The defendant refused to give this discovery. Exceptions were taken to the answer, and allowed, and the defendant now excepted to the Master's report.

Mr. Spurrier, for the exceptions.—The discovery sought has no reference to any relief as between the plaintiff and Davis, and it could not be used against the bankers, against whom, as mortgagees, the only relief is to redeem; and that is the subject of a separate suit.

[WIGRAM, V.C.—Suppose the documents to be Exchequer bills, could not the Court order them to be sold in this suit? The only effect of another suit would be, to do in two suits what might be done in one.]

The discovery sought is a vexatious inquisition into a man's private affairs—*Dos Santos v. Frietas, Small v. Attwood* (5).

(5) *Wigram on Disc.* 74.

WIGRAM, V.C.—I think the Master is perfectly right. I give no opinion whether, at the hearing, the Court would decree a sale or not, or in what way the equity would be worked out. It is not necessary that I should decide upon the abstract proposition, that a relief may be prayed so absurd, that the Court will look at it: such a case may exist. But the proposition on which I ground my decision is this—that the rule of the court is, that the defendant answering, shall answer everything material to the relief prayed; the Court assuming that the relief prayed will be given at the hearing, for the purpose of testing the materiality of the question asked. I have no difficulty in seeing that this question is most material; for it has been argued, that the only relief against the bankers is redemption: if so, the plaintiff is entitled to know what amount he is compelled to pay to the bankers for that purpose. If, then, the rule of the court is to assume that relief will be given if the case is proved, then this discovery, being part of the means of getting at such proof, must be given.

Exception overruled.

K. BRUCE, V.C. }
Nov. 24. } MILLER v. GOW.

Practice.—Sending case to Court of Law.

The Judge of a court of equity, requiring the opinion of a court of law, has the power of selection of the Court.

A case having been agreed on by the parties in this suit for the opinion of a court of law, a question arose as to which of the Courts it should be submitted to.

Mr. Swanston, for the plaintiffs, contended, that it was the privilege of the plaintiffs to select the Court, but—

KNIGHT BRUCE, V.C. said, he always understood the rule to be, that when a Judge of a court of equity required the assistance of a court of law, he had the power of selection; and he accordingly directed that the case should be sent to the Court of Common Pleas.

K. BRUCE, V.C. }
Nov. 24, 25. } PRENDERGAST v. TURTON.

Mining Company—Shareholder—Abandonment—Forfeiture.

Shareholders in mining companies lying by and declining to advance money for the necessary working of the mines, while other persons make such advances, are liable to forfeit their shares.

A shareholder, in a mining company had paid all the instalments due on his shares in October 1826. Further calls, which were not authorized by the deed of settlement of the company, were made on him for necessary outlays. These calls the shareholder declined to pay, and a correspondence on the subject, between him and the secretary of the company, terminated in September 1828, and the shares were, in a manner unwarranted by the deed, declared to be forfeited. The sums required for necessary outlays were furnished by the other shareholders, and in 1836 the mines began to be very productive. In 1838 claims were made, and a bill was filed for the purpose of obtaining a restoration of the forfeited shares. The bill was dismissed, the plaintiff not being entitled to any relief in equity.

The bill was filed by Mr. and Mrs. Prendergast, against the directors of a mining company, for the purpose of obtaining the restoration of certain shares, the property of Mrs. Prendergast, which had been declared to be forfeited.

By a deed of settlement, dated the 8th of February 1825, a mining company was formed under the title of the United Hills Mining Company. It was by the deed declared, that the capital should consist of the money to arise from the sale of 200 shares of 50*l.* each, and of such other shares as might be created under a power thereafter mentioned; and that, if the capital originally provided should not be sufficient, the directors should call a meeting of the proprietors, and lay before them the state of the concern, and submit the propriety of increasing the number of shares, or taking such steps as might seem advisable. It was also provided, that if any instalments on the shares should not be paid within fourteen days after the time fixed for payment, they should be forfeited. This was the only clause in the

deed with respect to forfeiture. A power was given by the deed of creating 100 new shares, in addition to the 200. The defendants Sir Thomas Turton and Clark, and another person, who soon after died, were declared to be the directors, and a lease of certain mines was made to them by a deed of even date.

Miss Kent became a proprietor of four shares in the company, and on the 30th of October 1826, had paid all the instalments due on them.

In December 1826, Captain Prendergast, who had then recently married Miss Kent, received a letter addressed to him by the secretary of the company, informing him that the mines required a greater outlay than the capital subscribed; that in July 1826, a meeting of the proprietors had been held, in which it had been resolved, that instead of creating new shares, money should be raised by further instalments on the old ones; that the directors had, in pursuance of the resolution, declared a further instalment due; and calling upon him to make the payments accordingly. A long correspondence ensued between Captain Prendergast and the secretary, the substance of which was, that the former disputed the right of the directors to call for further instalments, declined to pay anything further, and offered to sell his shares at 25*l.* each, and the latter insisted on this right, and declined the purchase. This correspondence terminated in July 1827.

In July 1828, the directors, in pursuance of a resolution made at a meeting of proprietors, ordered, "that notice should be given to Captain Prendergast that his shares were forfeited." This was communicated to Captain Prendergast and his solicitor, and some correspondence ensued between the solicitor and the secretary respecting the sale of the shares, which terminated in September 1828, without effecting any settlement.

Nothing further passed between Captain Prendergast, or his solicitor, and the company, until November 1837. It was stated by the bill, that he was abroad during that time; but it appeared by the evidence, that he had been a part of the time in Jersey, and a part in England, but never for any length of time out of the Queen's dominions.

It appeared that the mines had been very unprosperous, and worked at a loss between 1825 and 1836, but that, in the latter year, they began to be productive, and after that time were worked at a considerable profit.

During the whole season of unproductiveness the affairs of the company had been conducted very irregularly and in contravention of the terms of the deed of settlement, and it was admitted by the answer of the directors, that one Harding, who had been a director of the company, absconded from England in 1831, and soon afterwards sold to the defendant Campbell, before he became director, twenty shares, on which there was due an arrear of 300*l.* for instalments, at 2*l.* 10*s.* a share, and that, though Campbell had ever since had the benefit of these shares, this arrear had never been paid.

In 1836 the company was converted into a scrip company, and it was resolved that the capital should consist of 5,000 scrip shares of 5*l.* each, and that every original share should be represented by twenty scrip shares, and that the forfeited shares, including the plaintiffs', represented by 560 scrip shares, should be sold for the benefit of the company.

In November 1837, Capt. Prendergast again opened a correspondence with the secretary of the company, asserting his right to his shares, which was resisted by the solicitor of the company, and, after various attempts to get his claims admitted, he filed his bill in September 1838.

The defendants, by their answer, stated all the above circumstances and the correspondence, and objected that the shareholders had not been made parties, and set up as a defence the Statutes of Limitation and length of time.

The question, as to parties, was reserved until the case should have been heard.

Mr. Simpinson and Mr. Thomas Turner, for the plaintiffs.—*Norway v. Rowe* (1) does not apply to this case. That was on motion, and as no affidavits were allowed, the case stood upon the answer alone, which put the plaintiff out of court. Acquiescence is not put in issue by the answer; and even if it is, in all cases where rights have been held to have been barred by acquiescence, fraud has

(1) 19 Ves. 144.

always entered—*The East India Company v. Vincent* (2). There is no fraud in this case. The company and the directors had no right to call for further instalments on the old shares, or to declare them forfeited; and even the clause of forfeiture is imperfect.—They further insisted on the illegal, irregular, and unfair conduct of the directors, especially with regard to Harding's shares, and the hardships to which shareholders in companies would be exposed, if at any time they might be called on by a majority to sacrifice all they had expended, or advance money to an indefinite extent, more than they had originally contracted for. They also cited *Lake v. Craddock* (3).

In the course of the argument, his Honour observed, that there was no report extant of the other stages of the cause of *Norway v. Rowe*, but that he believed Mr. Rowe was left in quiet possession of the mines. It would appear so from the cases of *Rowe v. Wood* (4) and *Doe d. Hanley v. Wood* (5).

Mr. Swanston, Mr. Lovat, and Mr. Beavan, for the defendants, were not called upon.

KNIGHT BRUCE, V.C.—The view I have taken of this case, renders it unnecessary to consider the question of want of parties. I am not to be considered as deciding on the conduct pursued by the directors. My judgment is perfectly consistent with the supposition, that this conduct was unwarranted, and capable of being impeached, and successfully impeached, if questioned in due time. This point was strongly put to me by the plaintiff's counsel. My judgment is founded on the time of the institution of the suit, having reference to the situation of the parties. The property is a mineral one, which is of a mercantile nature, subject to considerable fluctuation, to many contingencies, to various risks—requires sudden outlays, produces great profits one year, incurs great losses the next. Of all properties, it most requires the parties interested in it to be vigilant and active upon their rights. This opinion, which is consonant to reason and justice, Lord Eldon expressed more than once, and always acted upon. It has

been followed by other Judges of great eminence. In the present case, it appears that the mines were considered not capable of being worked without further outlay; that further funds were necessary; that the plaintiffs objected to advance anything further; and that a discussion ensued, which was substantially concluded in 1828. The plaintiffs appear to have resided sometimes in England, sometimes in Jersey, but never out of the Queen's dominions. In this state of the mines, some parties were found to contribute funds, and to struggle with the difficulties. The mines were worked from 1829 to 1835 at a loss, but in the last year affairs look better, the mines are beginning to prosper; and then, whether legally or illegally, wisely or unwisely, is no matter here, the company was new modelled and converted into a scrip company. In 1836 and 1837 they continued to prosper, and in 1838, after a struggle with years of losses, a profit arises, but it is not until 1837 that the plaintiffs appear to claim their shares. A negotiation proceeds—there are demands and refusals, and the bill is filed in September 1838; but I will consider the demand as made in 1837. I was much impressed with the conduct of the directors, and I am most anxious to have the time accounted for; to have the chasm filled up in some way; to have some explanation. I was anxious to find some reason consistent with justice to give the plaintiffs the property they claim, but I am unable to find one. These parties apparently retire from the concern, when further advances are required; and after nine years, when the concern appears profitable, claim the benefit of it, but not before. There is no allegation of recent discovery, or ignorance of what was going on. It has been said, that the acquiescence has not properly been put in issue. I think that it has, in various parts of the answer, scattered up and down—in the conduct imputed to the plaintiffs in lying by. I find it impossible to say, that the plaintiffs are, in equity, entitled to any relief, though I regret it.

Bill dismissed, without costs, the directors waiving any claim they might have to them.

(2) 2 Atk. 83.

(3) 3 P. Wms. 158.

(4) 1 Jac. & Walk. 315.

(5) 2 B. & Ald. 724.

L.C.
Nov. 4; } *Ex parte* SHEPHERD *re* PLUM-
Dec. 8. } MER AND WILSON.

*Bankrupt—Proof—Joint and Separate
Covenant of Partners.*

A. & B, partners, mortgage their joint estate to C, and enter into joint and several covenants for payment of the mortgage debt. Upon their bankruptcy, C. claims to hold the joint security, and to prove the debt against the separate estate of each bankrupt:—Held, that C. was entitled to do so, retaining his joint security.

For the facts of this case, and the decision by the Court of Review, vide 9 *Law J. Rep.* (N.S.) Bankr. 31.

Mr. J. Russell and Mr. Bagshawe, in support of the special case, cited—

Ex parte Peacock, 2 Glyn & Jam. 27.

Ex parte Goodman, 3 Madd. 374.

Mr. Swanston and Mr. Hull, *contra*, cited

Ex parte Parr, 1 Rose, 76.

Ex parte Smith, 1 Ves. & Bea. 518.

Ex parte Freen, 2 Glyn & Jam. 246.

Ex parte Rodgers, 1 Dea. & Chit. 38.

Ex parte Connell, 3 Dea. 201; s. c. 7 *Law J. Rep.* (N.S.) Bankr. 44.

Ex parte Davenport, 1 Mont. D. & De Gex, 313; s. c. 10 *Law J. Rep.* (N.S.) Bankr. 1.

The LORD CHANCELLOR.—This was a special case stated under the act of parliament, 1 & 2 Will. 4. c. 56, and comes from the Court of Review, for the opinion of this Court. The facts, so far as it is necessary to state them, are shortly these:—Messrs. Plummer & Wilson, who carried on business as West India merchants, in partnership together, were indebted in the sum of 2,000*l.*, for money lent to them by George Joad, and being anxious to procure further advances, they executed a deed to secure the repayment of that sum, and the further advances; and by that deed they assigned to George Joad certain debts, secured to them upon certain West India estates, and entered into joint and several covenants, for the repayment to George Joad of the sums already advanced, or thereafter to be advanced to them by him, the total amount of the monies to be advanced not to exceed 10,000*l.*

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There was a similar transaction between the parties, as to money due for freight; the particulars whereof it is unnecessary to enter into. Messrs. Plummer & Wilson became bankrupts, and a commission was issued against them. George Joad thereupon did that which he was entitled to do, that is, he offered to prove against the separate estate of each bankrupt the amount of the debt due to him. It was said, that he was not entitled to make such proof, unless he gave up his joint security: and that is the question now before me. What are the principles applicable to cases of this description? If a party be a creditor of a bankrupt, and has also a security on the bankrupt's estate, he is not allowed to prove against such estate, without previously selling or giving up his security; because the principle of the bankrupt laws is, that all creditors of the bankrupt shall be placed upon an equal footing, and if a creditor chooses to prove his debt against the bankrupt's estate, he must previously either surrender or sell his particular security; but he cannot be allowed to retain his security and also prove his debt, in competition with the other creditors of the bankrupt. If, however, the creditor of a bankrupt has a security on a third person's estate, the principle I have referred to does not apply, and he is entitled to prove in common with the other creditors of the bankrupt, for the whole amount of his debt, against the bankrupt's estate, and to proceed against the security of the third party, for obtaining payment of the deficiency of his debt, provided he does not receive more than 20*s.* in the pound on the total amount of his debt. It is unnecessary to refer to authorities on this point, but *Ex parte Bennet* (1), *Ex parte Parr*, and *Ex parte Goodman*, establish these principles. Thus far there is no dispute. The next point is, that in the administration of an estate under the bankrupt laws, the joint and separate estates of the bankrupt are considered as distinct estates, and accordingly when a creditor possesses a separate as well as a joint security for a debt, and offers to prove under the joint estate, it has been considered he is entitled so to prove, without giving up his security on the separate estate. He may prove against both estates, provided he does not receive more

(1) 2 Atk. 527.

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than 20s. in the pound on the amount of his debt. That was determined in *Ex parte Peacock*. Counsel for the assignees were so much pressed by that case that they endeavoured to distinguish it from the present by shewing that there were peculiar circumstances in it, and that the partner in that case having died, his assets were not to be administered in bankruptcy; but the death of one of the partners was a mere circumstance, and had nothing to do with the case, and formed no ingredient in the decision of the Court. The principle was first decided in *Ex parte Peacock*, by Sir John Leach, and afterwards by Lord Eldon, and was followed by the Court of Review. What is the present case? It is the direct converse of that. Here, the creditor having a joint and several security, proves against the separate estate. That principle applies to the present case, and I am of opinion that he is entitled to prove against the separate estates of both the partners, without giving up his joint security. I consider the case of principal and surety does not apply to the present case, where each partner is a principal debtor, by means of the joint and several security he has entered into. The representatives of the creditor, therefore, are not bound to refund the monies received by them.

K. BRUCE, V.C. }
Nov. 15. } HINDE v. BLAKE.

Mortgage, Assignment of—Liability to Account—Plea.

A. mortgaged leaseholds to B, who entered into possession, received the rents, and sold a part under a power. A. afterwards mortgaged the equity of redemption to C. A. and B. then assigned the premises and mortgage debt to D. In a foreclosure suit by C,—Held, that B. might be called upon to account for the rents and purchase-monies received by him.

By an indenture, dated the 5th of January 1815, Thurles, a bankrupt, and his assignees, mortgaged a leasehold estate to William Roundtree, with a power of sale.

By an indenture dated the 31st of December 1819, a mortgage was made of the equity of redemption of the premises, to Messrs. Reid, under whom the plaintiffs claimed.

William Roundtree, soon after the date

of his mortgage, entered into possession of the premises, and sold a part of them under the power. He died, leaving the defendant Elizabeth Roundtree, his executrix and universal legatee, who continued in possession of the premises unsold, and sold another part of them under the power.

By an indenture, dated the 10th of October 1835, Elizabeth Roundtree, the assignees of the bankrupt, and his personal representatives, in consideration of 12,600*l.*, which was by the deed stated to be then due on the mortgage to Elizabeth Roundtree, assigned the premises then remaining unsold, and the mortgage debt, to the defendant Leonard Wilson.

The bill was filed by the plaintiffs, who claimed under the mortgage deed of the 31st of December 1819, against the assignees and the representatives of the bankrupt, and against Elizabeth Roundtree and Leonard Wilson, for the purpose of obtaining the benefit of their security. The bill prayed among other things, for the accounts of the rents and the purchase-monies received by Wm. Roundtree and Elizabeth Roundtree.

To this bill Elizabeth Roundtree put in a plea, which stated the indenture of assignment of the 10th of October 1835, and stated also, that the accounts had been fully settled between herself and the other parties to the indenture; that she had received the sum of 12,600*l.*, and that she had no claim, interest, or demand in the premises, and submitted, that she ought not to have been made a party.

Mr. James Russell, for the plea, argued, that the defendant Elizabeth Roundtree, had fully discharged herself from all liability, and that Wilson, her assignee, stood exactly in her place, and was the only person that could be called on to account in respect of the mortgage to Roundtree.

Mr. Purvis, for the plaintiffs, was not called upon.

Knight Bruce, V.C.—A mortgagee who enters into possession of, and sells a part of the mortgaged property, and receives the rents and purchase-money, becomes liable to account to all persons entitled to the equity of redemption, and cannot by his own act discharge himself from the liability. The plea is no answer to the bill, and must be overruled.

L.C. }
 Nov. 22 ; } RUNDELL v. LORD RIVERS.
 Dec. 25. }

Practice.—Exceptions—Master's Office—Bond—Proof of Consideration—Affidavits—Interrogatories.

It is not the practice in the Masters' offices, on proof of a bond debt, in the administration of assets, to require that the affidavit should state the consideration ; but it is sufficient to state generally that the party is indebted by bond in such a sum.

Two several exceptions were taken to the Master's report, and in support thereof five specific grounds were seriatim assigned and enumerated at the foot of the exceptions :—Held, that the exceptions were sufficient.

Where a reasonable case of suspicion is raised as to the validity of a bond, which it is necessary to prove in the Master's office, the Master, in the exercise of a fair discretion, ought to require proof of the consideration.

The bill in this case was filed by certain specialty creditors of Sir W. Rumbold, deceased, against Lord Rivers, who was his personal representative. The decree, which was dated the 9th of November 1838, was in the usual form, and on the 6th of May 1840, Master Horne, who succeeded Master Martin, as the Master in the cause, made his report, finding that several persons had come in before his predecessor, and also before him, and proved debts by specialty, amounting in the whole, with interest, and including the plaintiffs' debt, to the sum of 25,894*l.* 8*s.* 3*d.*, and which were set forth in the schedule to his report. Amongst other debts, the following were stated in the schedule, viz. first, a debt of 8,000*l.* due to Robert Gore and John Gore, on the bond of Sir W. Rumbold, dated the 29th of September 1826, in the penalty of 17,000*l.*, conditioned for the payment of eight several promissory notes for 1,000*l.* each, making together 8,000*l.*, on or before the 2nd of October 1827, and all interest, costs, charges, damages, and expenses, by reason of the non-payment thereof, and which were further secured by an indenture of assignment of a certain debt due to Sir W. Rumbold, deceased, from the late Marquis of Hastings, and 4,243*l.* 5*s.* 9*d.* for interest, in respect of such debt, from the 29th of September

1829, making in the whole, a debt due to Robert and John Gore of 12,243*l.* 5*s.* 9*d.* Secondly, a debt of 2,500*l.* to Isaac Nicholson and Thomas Bushby, surviving partners of Isaac Nicholson, the elder, deceased, on the bond of Sir W. Rumbold, dated the 29th of September 1826, in the penalty of 5,000*l.*, conditioned for payment of five several promissory notes of 500*l.*, making together 2,500*l.*, on the 2nd of October 1827, and all interest, costs, charges, damages, and expenses, by reason of the non-payment thereof, and which was further secured by an indenture of assignment of a certain debt due to Sir W. Rumbold from the late Marquis of Hastings, and 1,326*l.* 0*s.* 6*d.* for interest, making in the whole a sum of 3,826*l.* 0*s.* 6*d.*, due to Isaac Nicholson and Thomas Bushby.

Two exceptions were taken by the plaintiffs to the report, in respect of the two debts of 12,243*l.* 5*s.* 9*d.* and 3,826*l.* 0*s.* 6*d.*, and at the foot of the exceptions were assigned the five following reasons why the Master ought not to have certified these debts to be due :—

First, Because the Master, as well as his predecessor, though respectively requested so to do on behalf of the plaintiffs, did not require Robert Gore and John Gore, or one of them, on behalf of himself and the other of them, to make and bring in the usual affidavit, shewing whether any, and if any, what, consideration was given by them for their said bond debt or claim ; and did not require Isaac Nicholson and Thomas Bushby, or one of them, to bring in a similar affidavit ; and no such affidavits were laid before the Master or his predecessor, in support of either of the said claims, although both of the said claims were opposed by the plaintiffs.

• Secondly, Because the Master, as well as his predecessor, received the affidavits of John Gore and Isaac Nicholson respectively, in support of the two claims, as evidence that the two several bond debts were due to the respective parties ; and no other evidence was submitted to the Master or his predecessor.

Thirdly, Because the Master had allowed the respective debts, without any evidence, or any proper or sufficient evidence, having been furnished to him or to his predecessor, that any valuable or any consideration was

given by John Gore and Robert Gore, or Isaac Nicholson and Thomas Bushby, for or in respect of their respective bond debts or claims.

Fourthly, Because, notwithstanding that draft interrogatories were duly tendered on behalf of the plaintiffs to the Master, as well as his predecessor, for the examination of Robert Gore and John Gore, and Isaac Nicholson and Thomas Bushby, touching their respective bond debts or claims, and the consideration thereof, and other material particulars relating thereto respectively, and a state of facts duly supported by affidavits impugning the validity of the two bond debts or claims was carried in before the Master by the plaintiffs, yet the Master, as well as his predecessor, refused to settle such draft interrogatories, or to allow the plaintiffs to be examined on interrogatories or otherwise; and no examination of the claimants respectively, or any of them, touching their claims, had been taken or made before the Master, on interrogatories or otherwise.

Fifthly, Because the Master, as well as his predecessor, although the same was objected to on behalf of the plaintiffs, received the affidavit of the attesting witness to the two bonds, under which the parties claimed; and also the affidavit of the attesting witness to the indenture of assignment, referred to by the respective bonds, in proof of the execution of the bonds and indenture respectively, by Sir Richard Rumbold, deceased; and the Master, as well as his predecessor, although it was contended before them respectively by the plaintiffs, that the same ought to be so proved, refused to require execution of the bonds and indenture respectively, by Sir W. Rumbold, to be proved by the attesting witness thereto respectively, on a *vidé voce* examination, whereby the plaintiffs have been deprived of the benefit of a cross-examination of such attesting witness to the bonds and indenture respectively.

The facts relative to the bond, and the consideration for the same, are stated in his Lordship's judgment.

Mr. Tinney and *Mr. Toller*, in support of the exceptions, urged, first, that the Master ought to have required the usual affidavit to be made of the consideration given for the dividends, and cited 2 *Smith's Prac.* 306. Secondly, that the only evidence before the Master consisted of the affidavits

of the claimants, and that where the debt was contested, no attention ought to be given to such affidavits—*Fladong v. Winter* (1). Thirdly, that no proof whatever was adduced before the Master, of the consideration for the bond. Fourthly, that the Master refused to settle interrogatories for the examination of the claimants, although draft interrogatories were tendered to him for that purpose, or to allow the attesting witness to the bond to be examined *vidé voce*. Fifthly, that there were very strong grounds in the case for believing that the bond was given in respect of stock-jobbing transactions.

Mr. G. Turner and *Mr. Loftus Wigram*, contra, for Messrs. Gore.—No authority is cited in *Mr. Smith's* work, for the practice of the Court being as it is there stated; and the other books of practice contradict that work on the point as to an affidavit of the consideration being necessary in the proof of a bond debt.

Turn. & Ven. Chanc. Prac. vol. 1, p. 365, and vol. 2 of the same work, p. 92; and

2 *Newland's Chanc. Prac.* p. 313.

The affidavits adduced before the Master, with reference to the transactions, were of the most vague description, and stated the belief of the parties only, and were not sufficient to justify the Master's requiring evidence of the consideration given for the bond. The reasons, moreover, stated in support of the exceptions, ought to have been in the form of substantive exceptions, the Court holding parties excepting bound by the strict rules thereof. The 48rd of the New Orders of the 26th of August 1841, admits of exhibits being proved by affidavit, where necessary, instead of their being proved *vidé voce*; and, therefore, renders the objections taken to the affidavit of the attesting witness to the bond of no value.

Mr. Stuart and *Mr. Richards*, for Messrs. Nicholson & Co., contended, that the exceptions were informal, and that the affidavit of debt was sufficient, inasmuch as the reason for taking a bond was to save the necessity at a future time of proving the consideration for the instrument.

The LORD CHANCELLOR.—This is a case of exceptions, in point of form, and also in (1) 19 Ves. 196.

substance. With respect to the exceptions in point of form, the first was, that the affidavit of proof of this debt, which was a bond debt, did not state the consideration. The affidavit in a case of simple contract debt, as a matter of course, states the consideration, and it was the subject of controversy at the bar, whether, according to the practice prevailing in the Master's office, the affidavit, where it is a bond debt, should also state the consideration. Mr. Smith's book was cited in support of the affirmative of the proposition, and, I believe, some other similar authority. On the other hand, it was stated, that that was not the practice in the Master's office; I felt it my duty, under such circumstances, to apply to the Masters, and I have obtained a certificate signed by eight of the Masters, in which they state it is not the practice in their offices, in the case of the proof of a bond debt in the administration of assets, to require that the affidavit should state the consideration, but that it is sufficient to state generally, that the party is indebted by bond in such a sum. Another objection in point of form was this, that the subscribing witness to the bond was not called on to prove the execution of the bond in the usual way: it being proved only by his affidavit. The question therefore as to this point, was a question of fact, as to whether any objection had been made to this mode of proof. With respect to what took place in the Master's office, before whom the proceedings at present subsist, there was a contradiction between the gentlemen who attended; and the Master himself has certified, in a marginal note to the draft objections, that he did not recollect that any such objection had been made. It was admitted, however, by the gentlemen who appeared on the part of the claimants, that before Mr. Martin, and whilst the case was in his office, an objection had been made to the proof being taken *vivâ voce*; at all events, it was incumbent on him, under such circumstances, to require that the proof should be in the usual form on interrogatories.

Another objection was made on the other side, as to the form of the exceptions. It was stated, that the reasons which are assigned in support of the exceptions, should themselves have taken the shape of exceptions; but it does not appear to me, that there is any sufficient ground for that ob-

jection. The exceptions in point of form are, I consider, sufficient. The exceptions allege in substance, that the Master ought not to have reported that the debt was proved, for certain reasons, which state that he had not sufficiently and properly investigated the matter; and if those reasons are well founded, he ought not to have reported the debt proved. Therefore, I think, the form of the exception is sufficient. This brings me therefore to the consideration of the substance of the exceptions, and it is reported by the Masters, (I am not aware whether I put the question to them,)—but it is certified by the Masters, that in their offices, where a reasonable case of suspicion is raised, it is a matter of course for the Master to require the party proving the bond, to establish its validity by proving the consideration; and there can be no doubt, that that is the proper principle; and the question therefore in this case is on the affidavits, whether a reasonable case of suspicion is made out, so as to call upon the Master, in the exercise of a fair discretion, to have required proof of the consideration of this bond.

Now, in looking at these affidavits (which disclose a vast variety of matter,) the first objection that occurs to me on them is this, that the greater part of the affidavits speak as to information and belief as to facts, without stating from whom that information proceeded, or what is the ground of belief; and I consider such affidavits as of very little value in the administration of justice, and as forming no sufficient ground for judicial decision. Many reasons might be stated, but it is sufficient to say, that persons making such affidavits do not incur any of the usual responsibility; for, supposing the affidavits to be untrue, it would be almost impossible to institute any criminal proceedings against them, founded on such affidavits. The question therefore is this, whether, laying aside, or rejecting those parts of the affidavits, there is a sufficiency of facts distinctly stated to raise a case of suspicion.

Now, then, as to the facts. It appears, that Sir William Rumbold carried on business, in the East Indies, as a member of the house of Palmer & Co.; that house some years ago failed, and in the year 1823, Sir William Rumbold came over here, and remained in England till the year 1828, a period of five years, and it was during this

interval that the transaction in question occurred. It is sworn distinctly by Captain Arabin, who is his brother-in-law, that during that time he was engaged in no mercantile or commercial business whatever; he had affairs to settle with the East India Company, the nature of which does not appear, but he says he was not engaged in any commercial or mercantile transaction during that period. In the year 1825, or 1826, it appears, he accepted bills of exchange to the amount of 10,500*l.*, but who were the drawers of those bills of exchange does not appear. Those bills were cancelled, in consideration of his giving promissory notes to Messrs. Nicholson & Co., and Gore & Co. severally, for the same amount. The payment of those promissory notes was secured by the bond in question, and further secured by the assignment of securities of property of Sir William Rumbold. Now, the first question arises on that deed of assignment; it has struck me as singular, that, in reference to the bills of exchange that were given up, and for which promissory notes were substituted, that dates are given, and the sums are given: Sir William Rumbold is stated to be the acceptor, but the drawers' names are not mentioned. It is natural in a regular transaction, where bills of exchange are given up, and promissory notes substituted, to be secured by a bond, that those bills of exchange should be more fully described, and that the names of the drawers should have appeared in the instrument. In this case, the drawers' names do not appear. That, however, as a slight circumstance standing by itself, would not have very great weight; but it must not be disregarded in considering all the other circumstances of this case. Sir William Rumbold had solicitors; he was engaged in the settlement of some business; he had solicitors, viz. Messrs. Fladgate & Co. If this had been a regular transaction, it would have been very natural that he should have employed his solicitors to conduct it on his part. Messrs. Fladgate & Co. were not consulted; they knew nothing of the transaction; the whole affair was settled by Messrs. Wilde, Rees & Co., who were the solicitors for Messrs. Nicholson & Co., and so much so, that Mr. Rees, one of the partners of the house, was the subscribing witness to the execution of the assignment, and the bonds, by Sir William Rumbold.

In addition to that circumstance, this was a large sum of money, viz. 10,500*l.*, for which some bills of exchange were given; Messrs. Ransom & Co. were the bankers of Sir William Rumbold; no payment is made into the house of Ransom & Co. with respect to this transaction; there is no trace of any sum that can be referred to it, and yet it appears, that when 5,000*l.* was raised from the Westminster Life Insurance Company, by Sir William Rumbold, that money was paid into the house of Ransom & Co.; and, further, he had been the borrower of 1,200*l.* on his bond, and that money was also paid into the house of Ransom & Co. These transactions were conducted in a regular way, but there is no trace in the bankers' books, which have been examined, as to the consideration given for those bills.

Now, it is suggested, on the part of the person opposing the claim, that this was a stock-jobbing transaction, and that those bills of exchange were given for the payment of differences; that might be legal or illegal; that was so stated, and properly stated, at the bar. Let us see whether the case is made out, that it was probably a stock-jobbing transaction on these bonds, and these bills of exchange. Now, what appears? In the month of October 1829, Mr. Young, of the house of Fladgate & Co., on the part of Sir William Rumbold, paid Mr. Wilde, who was the solicitor of Messrs. Nicholson & Co., a half-year's interest on these two bonds, (the two bonds appear to be connected together, although given to different parties,) that is, he paid the sum of 262*l.* 10*s.*, which is precisely the half-year's interest, at 5*l.* per cent. on those bonds: what took place on that occasion? It was suggested, that the money might have been remitted from India for the payment of those bonds, through the house of Ransom & Co., and Mr. James Norris, the stock-broker, gave his written undertaking, signed by himself, to refund this 262*l.* 10*s.*, in case such a remittance should take place. So that it appears, that Mr. James Norris was connected with the transaction of these bonds: Mr. James Norris, the stock-broker, was connected with them. Payment to him was a payment to Nicholson & Co., or the payment to Nicholson & Co. was the payment to Mr. James Norris.

Further, it appears, that on a particular

occasion, Sir William Rumbold stated to Captain Arabin, that he had been engaged in stock-jobbing transactions with Mr. J. Norris (though he does not mention the name of Norris in paying differences,) and that he had been over-reached: there was a conversation to that effect. It appears on a particular occasion, Captain Arabin was sent by Sir William Rumbold to settle stock differences. Now, with whom were those stock differences to be settled? With Mr. Wilde. Who was Mr. Wilde? The attorney for Nicholson & Co. and Gore & Co. Mr. Wilde was the party who received the half-year's interest, and handed over the undertaking of Mr. J. Norris to reimburse that half-year's interest, in case it should be remitted from India. That is another circumstance leading to a suspicion that, in real truth, these bills of exchange were given for a transaction of this kind. But, that is not all. After the death of Sir William Rumbold, and when the dispute arose with respect to the claim on these bonds, Mr. J. Norris called on Captain Arabin, in Paris, and told Captain Arabin, that he was responsible for the money due on these bonds, so that Mr. J. Norris, the broker, is connected with every part of this transaction, and a letter was written by Sir W. Rumbold to Mrs. Arabin, asking Captain Arabin to come over for the purpose of settling the transaction, before he, Sir William Rumbold, returned to England, as it was a hard bargain, and he thought he might be let off. Now, taking all these facts together, I must say, they raise a case of suspicion in my mind, strong enough to lead me to the conclusion, that in the exercise of a fair discretion, the consideration of these bonds should be investigated. In what mode that investigation should take place, must be left in the first instance for the Master to decide. It may or not be proper, in the course of such an investigation, that the parties should be examined. It is difficult for me to say by anticipation, because the parties were not examined on a former occasion, that it will be necessary or proper to examine them now. A case may be made out, so as to render all examination unnecessary; on the contrary, the case may be so bare, that it may be necessary to examine the parties. It is not at all impossible that such a case may arise, for this reason: Mr. James Norris is

dead, and Sir William Rumbold is dead, and the only persons who can throw light on this transaction are the parties themselves, and Mr. Wilde himself is their solicitor. Under these circumstances, I think, the justice of the case, considering the amount of debt, requires that the case should go back to the Master, that he may investigate the consideration. It is said, that this examination will be attended with expense. Whether it will be necessary or not, I cannot anticipate, still, it will not, as it appears to me, be attended with much expense, whether the examination of the parties be *viva voce*, or by interrogatories; but considering the amount of the debt, and the nature of the transaction, I think justice requires that the case should go back to the Master. The exceptions therefore must be allowed.

L.C. }
July 16, 26. } TERRELL v. MATTHEWS.

Executors—Devastavit—Trustee—Exceptions—Pleading—Practice—Wilful Default.

A, an executor and trustee, concurs with his co-executor and co-trustee B, in selling out public stock, part of their testator's property, and in conveying and surrendering the testator's freehold, leasehold, and copyhold estates to purchasers, and they both subscribe the receipts in writing for the amount of the respective purchase-monies, which were indorsed on the back of the purchase deeds; but B. alone received the monies and the produce of the stock:—Held, that the acts in which A. had joined with B, being indispensable and necessary for the administration of the testator's estate, he was not liable for a devastavit thereof committed by B.

In a suit, instituted by residuary legatees under a will against A. and B, the executors (B. having become bankrupt, and at the time of his bankruptcy being largely indebted to the testator's estate), the ordinary decree only was made at the hearing of the cause, no distinct case of malversation having been adduced against A; and the Master, by his report, charged B. alone with the receipt of the testator's estate. The Court, on further directions, on the application of the plaintiffs, declined to direct an inquiry as to the balances of the

testator's estate, retained in B's hands from time to time, for the purpose of enabling the plaintiffs to establish a case of liability against A, in respect of such balances.

An executor, who proves a will, may be wholly passive, or active only so far as it is necessary to enable his co-executor to act in the administration of the estate; but the acts in which he joins must be necessary for the purpose of such administration.

This suit was instituted by certain residuary legatees, claiming under the will of Richard Bartholomew, and praying the usual accounts. The principal object of the bill was to make the defendant Fauntleroy, one of the executors, answerable for a considerable sum of money which his co-executor and co-trustee, the defendant Matthews, had received, and which was due from him at the time of his bankruptcy, being the produce arising from the sale of the testator's freehold, copyhold, and leasehold estates. The will contained the following proviso, viz. that in case either of the executors and trustees should, after the receipt of any part of the trust monies, pay the same to the other of them, he should not be chargeable or responsible for what he might so pay.

Both the executors proved the will, but the bill did not seek to charge the executors in respect of their wilful default. At the hearing, before the Vice Chancellor, the plaintiffs asked for a special inquiry before the Master, with a view to charge the defendant Fauntleroy with the receipts of his co-executor and trustee Matthews, but his Honour refused the application. Matthews, in his answer, admitted, that two persons, named William and John Bartholomew, who had received part of the testator's estates, were his agents. The plaintiffs did not enter into evidence previously to the original hearing, and by the decree a reference was directed to take an account of the personal estate of the testator, not specifically bequeathed, come to the hands of the defendants Matthews and Fauntleroy, or either of them, &c., distinguishing such parts thereof as came to the hands of Matthews prior to the date of the commission of bankrupt against him, and such parts as came to his hands since the said commission; and also to take an

account of the said testator's debts and funeral expenses, and the annuities and legacies bequeathed by his will; and he was to compute interest, &c. And the Master was directed to inquire, and state of what freehold, copyhold, and leasehold estates the testator died seised and possessed; and to take an account of the rents and profits of the said testator's estates, received by the defendants, Matthews and Fauntleroy, or either of them, or by any other person or persons, by their or either of their order, or for their or either of their use, and of the application thereof; and the Master was also to inquire, and state to the Court, what part or parts of the testator's freehold, copyhold, and leasehold estates had been sold since his decease, and when and to whom, and for what sum or sums of money; and he was also to take an account of the money produced by the sale thereof, and to ascertain by whom the same was received; and also to take an account of all and every sum and sums of money, the monies received and paid or retained by Wm. Bartholomew in the pleadings named, or by any person or persons by his order, or for his use, or on his account, for or in respect of the said testator's trade or business, which had been carried on by the said Wm. Bartholomew since the said testator's decease, for and on behalf of the defendants, Matthews and Fauntleroy, as executors as aforesaid, and of all and every the dealings and transactions which were had by the said Wm. Bartholomew, in the said trade, anterior to the sale thereof to him, and of the profits which arose from the said trade, during the period aforesaid, and how the same were applied and disposed of; and the Master was to inquire and state whether the testator's trade or business, and his stock and utensils used therein, had been sold, and to whom, &c.; and also to take an account of the monies received and paid by the defendant, John Bartholomew, on account of the said testator's estate.

The Master, by his report, found, amongst other things, that certain sums of stock, part of the testator's estate, had been sold out by Matthews and Fauntleroy, but that the produce had been received by Matthews only; that the rents and profits of the testator's estates had been received by Matthews, and no part thereof by Fauntleroy;

that the freehold, copyhold, and leasehold estates of the testator were sold by Matthews, but conveyed and surrendered by both Matthews and Fauntleroy; and that the receipts for the purchase-monies, indorsed on the back of the several purchase deeds, were signed by both Matthews and Fauntleroy, but that the purchase-monies, and the monies received in respect of the trade which had been carried on, were received by Matthews, or by his order, or for his use; and that Matthews had paid and laid out a considerable part thereof, in satisfaction of legacies, &c. The Master, by his report, treated John Bartholomew and William Bartholomew as the agents of Matthews only, and not of Fauntleroy and Matthews jointly.

The plaintiffs took sixteen distinct exceptions to the Master's report, on the ground that he ought to have charged Fauntleroy jointly with Matthews, with the account of all the monies which the Master had found to have been received by Matthews only.

The cause having come on to be heard on the exceptions so taken by the plaintiffs, and on further directions,—

Mr. J. Wigram and Mr. T. Parker, in support of the exceptions, cited the following cases—

Hovey v. Blakeman, 4 Ves. 596.

Chambers v. Minchin, 7 Ibid. 186.

Brice v. Stokes, 11 Ibid. 319.

Lord Shipbrook v. Lord Hinchinbrook, Ibid. 252.

Underwood v. Stevens, 1 Mer. 712.

Mr. Knight Bruce, Mr. Spence, and Mr. C. Barber, for the defendant Fauntleroy, cited—

Fellows v. Mitchell, 1 P. Wms. 81.

Leigh v. Barry, 3 Atk. 583.

Davis v. Spurling, 1 Russ. & Myl. 64.

Mr. G. Richards appeared for the bankrupt Matthews.

July 16.—The LORD CHANCELLOR.—The decree in this case directs merely the usual accounts of receipts against the defendant Fauntleroy; it was therefore not competent for the plaintiff to go into any case of wilful default, but it was open to him to prove any facts tending to establish actual or constructive receipt.

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On the exceptions the only question is, whether the Master has done right in finding that Fauntleroy had not received any part of the property; and not whether, having received any part, he may be affected by the provisions of the will, by which it is provided, that if either of the executors shall, after the receipt of any part of the money, pay over the same to the other of them, then he shall not be afterwards charged or responsible for what he shall so pay over.

The exceptions embrace several points: first, that the receipts and payments, on account of the general personal estate, that is, independently of the leaseholds and trade, ought to be considered as receipts and payments by Fauntleroy as well as by Matthews; secondly, that Fauntleroy was chargeable equally with Matthews for so much of the 4,300*l.* 3*l.* per cent. reduced annuities, as was sold, producing 3,825*l.* 14*s.* 6*d.*; thirdly, that Fauntleroy was chargeable with Matthews with the rents and profits received of the freehold, copyhold, and leasehold estates, and dividends of stock; fourthly, that Fauntleroy was in the same manner responsible for the proceeds of the sale of the copyholds; fifthly, that he was in the same manner responsible for the proceeds of the sale of the leaseholds; sixthly, that he was in like manner responsible for the receipts of the trade account; and seventhly, that he was in like manner responsible for the 500*l.* 18*s.* 9*d.*, the proceeds of the sale of the trade and stock.

These exceptions do not raise any question as to the accounts taken by the Master, or as to the facts found by him; but they all dispute the propriety of the Master finding the fact, that Fauntleroy was not liable jointly with Matthews for the several balances found due from the latter. I have, however, examined the evidence, and I think the results of it are accurately stated in the report. The first, being the result of the other exceptions, does not require a separate consideration. As to the second, the report finds, that the 3,825*l.* stock was sold, and the produce received by Matthews. It is to be observed, that the report does not state by whom the stock was sold, but, as it stood in the testator's name, Fauntleroy must have joined in the sale. I do not find any evidence applicable to the transfer of the stock; but the plaintiffs

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read passages from Fauntleroy's answer, in which he admits having joined in the transfer, but states he did so only to enable Matthews to apply the proceeds in payment of the legacies, which he believes he did, and that he did not himself receive any portion of such proceeds. As to the third head, I do not find any evidence of Fauntleroy having received any part of the rents and dividends of the stock, except that John Bartholomew says he received rents and dividends by the directions of Matthews and Fauntleroy; but he does not say he paid any part of such receipts to Fauntleroy. As to the fourth and fifth, the case as to the purchase-money of the copyhold and leasehold property is so much the same, that they may well be considered together; and as to both, it is proved that Fauntleroy joined in acts which were necessary to effect the sale—such as surrendering the copyholds, executing the assignment of the leaseholds, and signing receipts for the purchase-money. As to all, it is, I think, proved, that Matthews did, and Fauntleroy did not, receive the purchase-money. It is also manifest, that the sale was not improperly made, the time having arrived at which the property was to be divided.

The question as to the purchase-money will therefore be, whether, under this decree, the Master ought, under such circumstances, to have charged Fauntleroy with all or any part of the purchase-money paid on these sales. With respect to the copyholds, the question is of no value, the whole of the proceeds of the sale appearing to have been properly applied; but with respect to the produce of the leaseholds, a large balance was due from Matthews at the time of his bankruptcy.

As to the fifth head, viz. the trade account, there is in the report, not excepted to, a statement disproving that Fauntleroy received any part of such trade receipts; but it also appears, the whole of such receipts were properly applied, so that the question is of no value. As to the seventh, the produce of the trade or stock sold to William Bartholomew, the evidence is, that Fauntleroy joined in the instruments necessary to give effect to that transaction, but Matthews alone received the consideration.

What then is the liability, if any, which these circumstances impose on Fauntleroy?

The distinction which has been taken in some cases between the responsibility of executors and trustees, does not apply to the present case, because all the acts in which Fauntleroy joined being necessary to the administration of the estate, he was, in that respect, in the same situation as a trustee. An executor, though he proves the will, and thereby places himself in the situation of having controul over the testator's property, is not, in general, bound to act any further. He may be passive or active, only as far as is necessary to enable the other representatives to act in the administration of the estate; but it is part of the proposition, that the act in which he joins should be a necessary and proper act for the purpose of such administration. It may be required for the payment of debts or legacies; and an executor is safe in joining in the sale of stock or other property, and permitting another executor to receive the proceeds for that purpose, as in *Hovey v. Blackman*; but if he join in such sale when the money is not required, and he had not reasonable grounds for believing it was so required, he is liable for the money so received by his co-executor, as in the cases of *Brice v. Stokes* and *Underwood v. Stevens*. In the present case, the acts in which Fauntleroy joined were proper acts in the administration of the estate; and the joining of Fauntleroy in those acts was indispensable for the purpose of such administration. It comes, therefore, within the principle of the cases in which it has been held, that an executor merely joining in acts by which part of the estate is received by his co-executor, is not, under the circumstances, liable for the *devastavit* of his co-executor.

I am therefore of opinion, that the Master has done right in not charging Fauntleroy with these sums; and that the exceptions must be overruled.

The exceptions having been overruled, July 26,—

Mr. Wigram and *Mr. T. Parker*, upon the cause coming on for further directions, sought a direction for an inquiry as to the balances which had been retained in the hands of Matthews from time to time, for the purpose of rendering Fauntleroy responsible for the costs of the suit.

Mr. Knight Bruce, Mr. Spence, and Mr. C. Barber, for the defendant Fauntleroy, contra.—A direction as to wilful default is not, as of course, against an executor, though, in a great proportion of short causes, a direction as to wilful default is inserted in the decree against executors, and the reservation of further directions does not of itself justify an inquiry being directed as to wilful default; for further directions are only necessary with reference to materials added to the cause by the Master's report; and in this case, the defendant Fauntleroy has been during thirteen years detained as an accounting party. It is necessary both to allege, and prove to the satisfaction of the Court, a case of wilful default against an executor, if you mean to charge him with the consequence of an act of wilful default. One charge of the plaintiffs is, that the settlement of the accounts was improperly delayed, but it is nowhere stated that the loss by the bankruptcy of Matthews arose from that delay; another charge is, that Fauntleroy ought to make good all such loss as shall have arisen by Fauntleroy's neglect or default, but no neglect or default on his part is stated on the record, which could call the attention of Fauntleroy to the necessity of giving evidence on the question of wilful default. There is nowhere any allegation that Fauntleroy was ever required to call Matthews to an account for his receipts and payments. The will, moreover, contains a special clause of exemption from responsibility, in case either of the executors should pay over any part of the estate to the other of them. The Court was, on a former occasion, satisfied that the receipt of the monies was proper on the part of Matthews, the same being required for the administration of the trusts of the will. If the conversion had not been necessary, then the case would have been different, and a contrary rule would have prevailed. No evidence of misconduct can be read from the answer, or otherwise produced against Fauntleroy; and the plaintiffs must institute a new suit, if they wish to charge Fauntleroy with wilful default. He is therefore entitled to ask a direction for the payment of his costs, charges, and expenses, as between solicitor and client, out of the fund in court.—The cases cited on behalf of the defendant Fauntleroy were—

Travers v. Townsend, 1 Mol. 496.

Garland v. Littlewood, 1 Beav. 527; s. c. 8 Law J. Rep. Chanc. 369.

July 26.—THE LORD CHANCELLOR.—As to the general proposition, to charge the defendant Fauntleroy for wilful default, it does not appear to me to be raised in this cause, and therefore I abstain from saying anything on that subject; but I am told, that the Master of the Rolls has, according to a case lately before him, given a very positive opinion, and laid down a rule certainly contrary to the principles I have in some cases acted on. Yet I cannot but think that there was something in that case (1) beyond what appears on the face of the report: however, it is unnecessary, and it would not be proper for me, at the present moment, to give any opinion on that question. The question here is, whether, after what has taken place, Mr. Fauntleroy is so far to have the judgment of the Court kept suspended over him, as to have the payment of his costs postponed. That is the only question that remains. He must be a party to the cause, and cannot be dismissed; and the only question is, whether he is so far discharged by what has already taken place, as to give him the ordinary allowance which, as an executor, he is entitled to. The bill and the evidence does not make out any case against Mr. Fauntleroy, to make him answerable for the receipts of Matthews, and raises no distinct case of malversation against Fauntleroy; and as to the decree, it entirely passes by all question of making Fauntleroy liable for any act of Matthews, and it directs the ordinary account of receipts and payments. Now, when the exceptions came before me, the only question I had to consider was, whether, under the decree, the Master had done right or not in charging Fauntleroy with sums which had been paid into the hands of Matthews. I was of opinion, that there were not, on the face of the report, and the evidence before the Master, grounds on which Mr. Fauntleroy should be charged with those receipts. It is quite consistent with the case which might have been made for making Mr. Fauntleroy liable for money not actually received by himself, that there

(1) *Garland v. Littlewood*, 1 Beav. 527; s. c. 8 Law J. Rep. (n.s.) Chanc. 369.

might be a case made for charging him with monies which he ought to have received, but had not. That is not the decree, nor, on the face of the report, is there anything to shew that Mr. Fauntleroy has so negligently conducted himself, as to make himself liable for the acts of Mr. Matthews, or for any part of the estate which had not been actually received by him. Now what is asked with respect to Matthews, having regard to what appears on the face of the report, is, that the Master may inquire as to the amount of the balances from time to time in the hands of Matthews, assuming, as the party must assume, after what has taken place on the exceptions, that the question between the plaintiff and those who represent the estate, is confined to Matthews, and no longer exists as between the plaintiff and Fauntleroy; the account having been taken, so far as Fauntleroy is concerned; and the Master finds that nothing had come into his hands, and the Court has, on exceptions, confirmed that opinion of the Master, so expressed in his report.

Mr. Fauntleroy has nothing whatever to do with the inquiry with respect to the money which had come into Matthew's hands. The Court having declared that he is not liable for those balances, is Mr. Fauntleroy to be kept in the Master's office, without the power of interfering or disputing that account, or bringing any evidence before the Master on that subject, in order incidentally, and arising out of the inquiry between the other parties, that in the progress of the cause something may appear to be made use of to prove his liability, which has not been the subject of any adjudication at the present time? To do so, would be introducing a principle which this Court never adopted before. I must, therefore, consider, that quite independently of the principal question as between those who are the parties to the inquiry. The report made, and the decision of the Court on that report, concludes the account so far as Mr. Fauntleroy is concerned. Then as it concludes the account so far as Mr. Fauntleroy is concerned, there is nothing in the case to deprive him of the ordinary allowance, which an executor is entitled to, of costs as between solicitor and client.

L.C. }
July 23. } **EMPERINGHAM v. SHORT.**

Pauper Cause—Appeal—Six Clerk.

A person suing in formâ pauperis must obtain the six clerk's certificate of the propriety of an appeal from a decision of the Court below, before he can be heard.

This was an appeal, presented by a person suing in formâ pauperis, from the decision of the Court below.

Mr. Bethell and Mr. W. M. James, on behalf of the respondents to the appeal, objected that the appellant had not procured the six clerk's certificate of the propriety of the appeal, which the practice of the court required him to do.

Mr. Cooper appeared for the appellant.

His Lordship, after observing that the practice, as stated, was a wholesome one, and ought to be preserved, inasmuch as it had the effect of keeping out of court improper cases, ordered the appeal to stand over until the six clerk's certificate should have been procured.

WIGRAM, V.C. }
Nov. 12, 13, 18. } **SUTHERLAND v. BRIGGS.**

Specific Performance—Lease—Parol Agreement—Part Performance.

B. was tenant in possession of a house, under a lease from A. for thirty-one years, at a rent of 60l., with a covenant in the lease, on the part of B, to do certain repairs at a cost of 300l., towards which he was to be allowed 150l. out of the rent. B. also held of a third person, an adjoining field, as a yearly tenant, at a rent of 9l. A. afterwards employed B. to negotiate the purchase of the field, saying he would "attach" it to the premises, and the then repairs were to be delayed till the result was known. A. purchased the field, and it was then verbally agreed, that the alterations and improvements should be extended, so as to carry the house into the field, and to take in part of the same as a garden, at the joint expense of A. and B. These alterations were carried into effect under the superintendence of A's surveyor, at an expense of 660l. A memorandum was then drawn up

in A's handwriting, and signed by B, to the effect, that A. having agreed to advance to B. 330l., in addition to the 150l., it was agreed, that the rent of 69l. for the house and field should be increased to 80l. This sum was received by A. as one entire rent for the house and field for some years, when the defendant, as a purchaser from A's devisees, brought his ejectment to recover the field. On a bill by B. for specific performance, &c., it was held, that there was proof of a parol agreement to grant a lease of the field, and that it was sufficiently proved from the facts in evidence, coupled with the memorandum, that the interest of B. in the field was to be commensurate with his interest in the house; and that the improvements and the expenditure of B's money, being according to the previous agreement, were a sufficient part performance to take the case out of the statute.

The bill stated, that in February 1831, the plaintiff, as assignee of a lease granted to A. B, was in the occupation of a house and premises at Hayes; and that A. B, during his occupation, and the plaintiff, after the assignment of the lease to him, occupied a meadow, the property of a third person, but adjoining the premises comprised in the lease, at a rent of 9l. per annum. The house and premises being out of repair, it was shortly afterwards agreed between the plaintiff and Frampton (the lessor), that the plaintiff should have a new lease granted to him for thirty-one years, commencing from Christmas 1830, at a rent of 60l. a-year, and that the lessor should allow him 150l. out of the rent, on condition that he, the plaintiff, would expend not less than 300l. in the repairs of the house, and would pull down two cottages on the premises, and build a new house upon the site. On the 10th of October 1831, a lease was granted by Frampton to the plaintiff, according to the terms of the agreement. Whilst the repairs were going on, it was suggested to Frampton, that it would be desirable to purchase this meadow, and attach it to the house and premises. The plaintiff was employed to negotiate the terms of the purchase, and finally the meadow was purchased by Frampton. Communications then passed between him and the plaintiff, as to further alterations in the premises comprised in the lease, and it was then proposed by Frampton,

that the back of the house, which abutted close upon the meadow, should be taken down and rebuilt, and a bow window made, projecting into the meadow, and that the garden should be enlarged by taking in part of the meadow, and a fence made, and a belt of trees planted for the benefit of the occupier of the house. The fence and the plantations were accordingly made under the superintendence of Frampton's surveyor, who also under Frampton's directions prepared a plan, which carried the house into the newly purchased land. It was calculated, that these repairs would come to about 300l., which it was agreed should be borne by the parties in equal proportions; and this, upon the understanding that the meadow was to be attached to the premises. The alterations were finished in 1835, and the costs amounted to 660l. The plaintiff then called upon Frampton to contribute a larger sum than that originally proposed, which he agreed to do, provided the plaintiff would pay an increased rent; and it was finally settled, that plaintiff should pay for the whole premises one entire rent of 80l. a year; and the following memorandum, in the handwriting of Frampton, was signed by the plaintiff: "3rd February 1836, Mr. Frampton having advanced me the sum of 330l. towards the additions and improvements lately made by me to the house and premises at Hayes, in my occupation, in addition to the 150l. previously allowed me for rebuilding the adjoining cottage, it is agreed, that the rent of 69l. now paid for the house and field shall be increased to 80l. a year, clear of all deductions, from Christmas last. (Signed) A. Sutherland."

This sum was received as one entire rent for the two properties by Frampton, till his death in September 1836, and by his devisees afterwards, till the 10th of June 1840, when notice was served upon the plaintiff, that under a decree of the Court of Chancery the meadow was sold to Briggs, and that he was entitled to 9l. per annum as the rent of the same. On the day following, the plaintiff was served with a notice to quit by Briggs, who afterwards brought an action of ejectment to recover possession of the meadow. The plaintiff then filed his bill against Briggs, praying an injunction, and a declaration, that the plaintiff was entitled to the tenancy and occupation of the meadow for

the residue of the term granted of the house. The answer of the defendant insisted, that Frampton, though absolute owner of the meadow, was but a trustee of the house, &c., and therefore had no power to mix up the two estates in the manner suggested in the alleged agreement. But no evidence was given that the plaintiff was cognizant of the trust. Evidence was given by the plaintiff, that the defendant had actual notice of the plaintiff's claim before he became the purchaser of the field.

Mr. Temple and *Mr. K. Parker*, for the plaintiff.—Laying out money in building and improvements according to the agreement, is a sufficient part performance to take the case out of the statute—

Mundy v. Joliffe, 9 Law J. Rep. (N.S.) Chanc. 95.

Forcraft v. Lister, cited in 2 Vern. 456.

Ex parte Hooper, 19 Ves. 478; s. c. 1 Sugd. V. & P. 200.

But, even if this were a mere licence to occupy, it would not be recoverable at the pleasure of the grantor, though not in writing—*Winter v. Brockwell* (1).

[WIGRAM, V.C.—Turning land into a garden, might only amount to a new mode of cultivating the land. *Mundy v. Joliffe* was a case of the first impression.]

But this memorandum was an agreement in writing. It is in Frampton's handwriting, and his name is at the heading of it. The signature is only required to give it authenticity—

Stokes v. Moore, 1 Cox, 219.

Allen v. Bennet, 3 Taunt. 169; s. c. 1 Sugd. V. & P. 181.

If Frampton were alive, the plaintiff might have had specific performance against him, and the defendant had notice at the time of his purchase.

Mr. Simpkinson and *Mr. Faber*, for the defendant.—In the cases cited, there was a distinct contract between the parties. Here, what are the terms of the lease, if the Court should decree specific performance? There is no mutuality in this case, for Frampton could not have compelled the plaintiff to take a lease—*Howell v. George* (2). There is nothing in the plaintiff's outlay inconsistent with the supposition

of a tenancy from year to year. The motive for the repairs was the 150*l.* allowed out of the rent. An act, to constitute part-performance, must be unequivocally referable to some previous contract; such as taking possession, &c.; but here the plaintiff was in previous possession of the house and field—*Morphett v. Jones* (3). Payment of part of the purchase-money is not part-performance. The utmost that the plaintiff could be entitled to would be that part of the meadow that was built upon.

Mr. Temple, in reply.

[WIGRAM, V.C.—Does your bill allege an agreement before the expenditure?]

The plaintiff was in possession of the house; and it was agreed, after the purchase of the field, that the expenditure should be increased and borne by the parties in moieties. The other side admit, that the plaintiff is entitled to the part of the meadow upon which the house stands; if so, he is entitled to the garden also, and, on the same principle, to the whole of the meadow.

WIGRAM, V.C.—By a lease, dated the 10th of October 1831, J. A. Frampton demised a house and some cottages at Hayes, for thirty-one years, at 60*l.* a year. By a covenant in the lease, the plaintiff was to take down two of the cottages, and build a house upon the site, at an expense of not less than 300*l.*, 150*l.* of which sum was to be allowed him out of the rent. The house stood so near the boundary fence that it was only separated from the meadow by a ditch, about six feet wide. This meadow, prior to the plaintiff's tenancy, was held by a prior occupier of the house and premises, at a yearly rent of 9*l.* Upon a lease of the house and premises being made to the plaintiff, he became the occupier also of the meadow. In 1834, the alterations and repairs were to be made; but before they were done, Frampton purchased the meadow, and a treaty was proceeding to determine the then alterations and improvements, and to extend the same into the meadow; and Frampton's surveyor was to settle the plans; and to decide at what expense it was to be done, and by whom to be borne. In the result, the premises were altered by carrying the house to the edge, if not beyond the

(1) 8 East, 308.

(2) 1 Madd. 1.

(3) 1 Swanst. 181.

boundary line of the meadow, and by advancing the garden fence eighteen feet, and planting a belt of trees. The expense was estimated at 300*l.*, but eventually amounted to 660*l.*, which was paid by Frampton and the plaintiff in moieties; and by a memorandum of the 3rd of February 1836, it was agreed between them, that the rent for the house and premises and the meadow should be increased to 80*l.* a year. Frampton died, having devised the meadow to certain persons whom it is not necessary to mention. From the time of the memorandum to June 1840, the plaintiff paid one entire rent; when on the 10th of June in that year, he was served with notice to pay 9*l.* to the defendant as rent for the meadow, and also with notice to quit the meadow. The plaintiff then made inquiries, when he discovered that the meadow had been sold, under a decree of the Court of Chancery, to the defendant; and then the present bill was filed, praying a declaration, that the plaintiff is entitled to the meadow for the residue of the term mentioned in the lease of the 10th of October 1831, and in effect, that such tenancy may be secured to him by the Court. In order to bring forward the real question, I must observe, that the defendant cannot be in a better situation than Frampton himself; and the plaintiff being in the occupation of the meadow at the time of the defendant's purchase, the defendant must be affected with notice of the lease, and all the equities of the plaintiff. But independent of this rule, it is in evidence, that the defendant at the time of his purchase, had actual notice of the plaintiff's claim. The question then is, whether the plaintiff could establish against Frampton the right he now claims. The equity on which the plaintiff rests his case, is the expenditure of money upon the house and premises and the meadow, upon the faith of the alleged agreement, that the plaintiff should have a lease of the meadow, commensurate with his interest in the house and premises; the defendant says, that there is no such agreement sufficiently alleged in the bill or proved in the cause, and there are also other grounds of defence. The plaintiff has gone into evidence oral and documentary. The defendant has gone into no evidence, except by calling the attesting witness to prove his handwriting to a deed, which I shall afterwards notice. Some parts

of the case are free from doubt. It is clear, that specific repairs were determined on by Frampton and the plaintiff together; that the plaintiff was to be the actor; and Frampton's surveyor was to superintend the work, the total cost, estimated at 300*l.*, was to be borne equally. In the result, 660*l.* was expended, and an amicable dispute was then carried on, whether Frampton should pay the moiety of this sum, or 150*l.*; and in the end, the 660*l.* was paid by them in equal proportions. Taking these facts as clearly established, and presuming the agreement to be sufficiently proved, I shall now consider the points raised by the defence, upon the hypothesis that such is the case. The first is, that the premises being in the possession of the plaintiff, the expenditure did not unequivocally shew, that it proceeded upon a contract with the landlord, and that so it did not come within the case of *Morphet v. Jones*; but if the act of extending the house into the meadow, with the landlord's consent, is not to be considered as a circumstance of part performance, I do not know what act of a party in possession can ever be so considered. Circumstances much less striking have been considered evidence of a contract—*Sugden's Vend. & Pur.* 10th edit., p. 200. *Mundy v. Joliffe* was cited, as illustrating the rule of the court, with respect to the alterations in the garden and the plantations. In that case, the draining of the land was held sufficient. But it was said, that the exigency of the case would be satisfied by giving the plaintiff so much of the meadow as the house stood upon. If, however, the acts done by the plaintiff were done as acts of part-performance, the rule of court would entitle him to prove the entire agreement, and the act of building the house upon part of the meadow would go to the whole meadow. *Mundy v. Joliffe* would apply to this part of the case. The third point made was, that the time for which he was to occupy was not proved. The memorandum of the 3rd of February 1836, is in these words—[His Honour here read the memorandum].

This memorandum is in Frampton's handwriting, and signed by Sutherland; it does not mention the term for which the plaintiff is to hold the meadow, for which, in conjunction with the house and premises, the rent of 80*l.* was to be paid; and there is no

other evidence specifically going to that point. But the plaintiff's interest in every part of the meadow was intended to be the same, and the reservation of one entire rent for the whole property is sufficient to determine this question, and there is nothing to justify the apportionment of the rent. The next point, and one which was strongly urged, was this, that it appeared by the answer, and by the deed as to which the defendant examined his only witness, that Frampton was not the beneficial owner of the house, &c. but a trustee to the use of another; and the expression was used, that there was no mutuality in the agreement. It was insisted, that Frampton could not have compelled the plaintiff to accept a lease from him, and that therefore the plaintiff could not insist upon Frampton giving him one. It is not suggested, that the plaintiff had notice of the trust; nor does it appear from the deed produced, that Frampton could not have lawfully granted the lease in question. But is the deed so proved, that the Court is bound to act upon it? There is no proof of the handwriting of the attesting witness. But excluding this observation, the objection is not well taken. Frampton had a clear power to grant a lease of the meadow, and could not have been heard to say, that he could not grant such a lease, because he could not make a good lease of the adjoining property: mutuality has no application here. A vendor cannot make a purchaser take a bad title, but a purchaser may compel a vendor to give him what title he can. A party, who has not signed an agreement, may enforce it against a party who has signed. The next point was, that as the agreement was reduced into writing, and the duration of the tenancy was not specified, the Court could not introduce it, because, that would be to add a term by parol to a written agreement. I am of opinion, that the memorandum, taken in connexion with the facts of the case, does itself ascertain the duration of the tenancy; but, if not, there would be nothing to prevent the plaintiff proving part performance from using the memorandum, in conjunction with other evidence, to prove the terms of the agreement. The last question was, has the plaintiff sufficiently alleged such an agreement, as he asks by the prayer of his bill? There are two grounds on which the plaintiff's case is

good: First, the bill does sufficiently allege an agreement, before the plaintiff's expenditure of his money, to grant a lease as an inducement to do the improvements. Secondly, there is sufficient consideration to support the agreement. Neither of the propositions is alleged with precision, but the whole tenor of the bill bears out the construction. After noticing Frampton's proposal to the plaintiff, and stating the arrangement between Frampton and the plaintiff, and the suggestion of the plaintiff, that Frampton should purchase the meadow, it proceeds as follows:—"That Frampton assented to the suggestion of the plaintiff, and inquired of him, whether he thought it likely that the owner of the meadow would sell it, for, if so, he, Frampton, would purchase it, and *attach* it to the premises; and that it was then arranged, that the projected alterations should not be made till the result was known, because, if Frampton became the purchaser, it would be desirable to take in part of the meadow as a garden, and that the proposed alterations should be carried into the meadow." What sense am I to put upon the word "*attach*"? The plaintiff was then in possession as tenant from year to year. There is no other reasonable interpretation of the word, when addressed to a lessee about to lay out money, except that the two should be enjoyed together. In 1834, Frampton informed the plaintiff, that the purchase was completed, and he treated the meadow as part of the premises to be occupied by the plaintiff. The bill suggested, that the alterations would not have been made, except it had been intended that the meadow should be united to the house, and enjoyed by the plaintiff for the residue of the term in his lease; and it was agreed between them, that the repairs should be done in such a comprehensive and substantial manner, as that the same might be permanently beneficial to Frampton. These and other passages in the bill are sufficient to shew, that the agreement was sufficiently alleged, and that there was a sufficient consideration for the memorandum. In the course of the argument, the correspondence between Frampton and the plaintiff was much commented upon. It is enough to say, that it nowhere contradicts the agreement alleged. It is important principally in shewing, that it was on Frampton's invitation, that the plaintiff

expended his money on the premises. I think the plaintiff is entitled to a decree according to the prayer of the bill; and, if the defendant requires it, there must be a decree that the plaintiff executed a lease, the terms to be settled by the Master. Costs reserved, with liberty to either party to apply.

K. BRUCE, V.C. }
Dec. 10. } *SILLICK v. BOOTH.*

Presumption of Death—Issue.

A. and B. sailed from Demerara on the 19th of December 1827, and after that day, neither they nor their ship were ever seen or heard of:—Held, on the evidence as to the prevalence of hurricanes between that day and the 10th of January, that A. and B. must be presumed to have died before the 24th of January 1828.

An issue to try the question was, under the circumstances, refused by the Court.

Richard Harwood, by his will, bequeathed legacies to his two sons, James and Charles Harwood, and died on the 24th of January 1828.

A bill was filed for the administration of the assets of the testator; and by the decree it was, among other things, referred to the Master to inquire whether the legatees, James and Charles, had survived their father, with reference to the lapse of the legacies bequeathed to them. The Master, upon the evidence before him, the effect of which is here given, found, that James and Charles had survived their father. Exceptions were taken to the Master's report on this point.

James and Charles Harwood sailed from Demerara on the 19th of December 1827, in a brig of 235 tons, called the *Thames*, a new vessel, seaworthy, and of good capacity for sailing. One of the witnesses received a letter from Dominica, stating that the *Thames* had touched there on the 24th of December. From that time, neither ship nor crew had ever been seen or heard of.

Mr. Robertson, a witness of twenty years' experience in those seas, deposed, that though the average passage from Demerara to England was sixty-two days, many passages were much longer; and that the earliest

period at which a ship could be presumed to be lost was four months. He had himself sailed from Demerara on the 19th of January, and he had spoken to a captain who had sailed the day after the departure of the *Thames*, and other captains who had sailed in December and January. He stated, that he thought it probable, from what he knew of his own and the other passages about that time, that the *Thames* had calms and fine weather for the first six weeks, and after that time, very severe and boisterous weather, in which she had foundered. The passages about that time occupied ninety days and upwards. For these reasons, he believed that the vessel had not perished until after six weeks from leaving Demerara, that is, after the 24th of January, the day of the death of the testator.

Mr. Danson, a witness also of great experience, stated, that the seas between the Bermudas and Jamaica were liable to sudden and violent storms between the 1st of August and the 10th of January, which period is called by the sailors the hurricane months; and that premiums demanded for insuring vessels sailing between England and the West Indies during that period are double the amount required at other parts of the year. He also stated, that ships sailing about the same time from the West Indies to England might encounter very different weather, according to the track they took and their rates of sailing; and that one ship might be subject to the influence of a hurricane which another ship sailing near it would escape. He was of opinion that the *Thames* was lost early in January.

Mr. Swanston and Mr. Purvis, for the exceptions.

Mr. C. P. Cooper and Mr. Hare, for the report.

The following cases were cited—

- Webster v. Birchmore*, 13 Ves. 362;
- Wilson v. Hodges*, 2 East, 312;
- Watson v. King*, 1 Stark. N.P.C. 121;
- The King v. the Inhabitants of Twynning*, 2 B. & Ald. 386;
- The King v. the Inhabitants of Harborne*, 2 Ad. & El. 540; s. c. 4 Law J. Rep. (N.S.) K.B. 83;
- Doe d. Knight v. Nepean*, 5 B. & Ad. 86; s. c. 2 Law J. Rep. (N.S.) K.B. 150;

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Nepean v. Doe d. Knight, 2 Mee. & Wels. 894; s. c. 7 Law J. Rep. (N.S.) Exch. 335;
as to the presumption of death.

Mason v. Mason, 1 Mer. 308,
was cited as to the right of the parties to have the question sent to a jury.

KNIGHT BRUCE, V.C.—A court of equity may, if, in the exercise of its discretion, it shall so think fit, call in the assistance of a jury, but it is not bound to do so. That the property is small; that much time and money have already been spent in the investigation of the matter; that if this Court decide on the matter of fact, the Lord Chancellor will probably not send it to a jury, so that this expression of opinion by myself may enable parties dissatisfied with it to have the opinion of the Lord Chancellor: these reasons induce me not to refrain from expressing and acting on the opinion I have formed on this case. There is no occasion to consider here, as in many of the cases cited, which is the negative and which the affirmative proposition. The Court has to be satisfied that, under the circumstances before it, the assets of the testator are rightly distributed. The two brothers, who were seafaring men, sailed, in a brig of 235 tons, from Demerara, on the 19th of December 1828. There is evidence, which is not strictly legal, that the ship was seen at Dominica on the 24th of December. My view is the same, whether this evidence be admitted or not. Subject to the question whether she was seen on or about that day, the ship was not seen or heard of after the 19th of December. There is no doubt that the brothers would now be presumed to be dead; but the question is, whether they could be presumed to have died before the 24th of January. Considering the local nature of hurricanes, that they are limited in space in those seas, it is quite consistent with Mr. Robertson's evidence, that the *Thames* may have had stormy weather before the 10th of January. Danson's evidence is specific as to this point. He says, that the period between the 1st of August and the 10th of January is called the hurricane months, in consequence of the greater prevalence of violent storms; and that, in consequence of that prevalence, higher premiums of insurance are demanded for ships

exposed in those seas during that time; and that it is probable that the ship was lost on or before the early part of January. That is also my opinion. I have no hesitation in saying, that the probability, and therefore the presumption, is, that they were lost before the 24th of January. It is not necessary for me to express any opinion as to what the Court would do, where there were no circumstances of health, risk, or danger as ingredients in a case—as, where a healthy man is seen in a particular place at a particular day, and from that time has never been seen or heard of, at what time his death would be presumed to take place. There was no decision on this point in *The King v. the Inhabitants of Harborne*, nor is my opinion in this case any decision. In my view, the brothers are presumed to have died before the 24th of January; and therefore, the exceptions must be allowed.

Exceptions allowed.

K. BRUCE, V.C. }
Dec. 9, 10. } OSBORNE v. HARVEY.

Specific Performance—Acts of Ownership
—*Payment of Purchase-money into Court.*

A purchaser of a field entered into possession under the contract, and filled up a pond, and cut down and stubbed up an osier bed:—Held, that these acts did not amount to a waiver of title, but that the purchaser would not be allowed the usual reference for title, unless he paid the purchase-money, and all interest accrued due on it, into court within three weeks.

The defendant was the purchaser of a piece of land of about four acres, at a sale by auction, on the 7th of June 1837. By the terms of the contract, the purchaser was to be let into possession on the 11th of October following, and the purchase to be completed on the 7th of January 1838, and interest to be paid on the purchase-money from the 11th of October until the completion of the purchase.

The defendant took possession of the land under the contract on the 11th of October, and between that time and Christmas in the same year filled up a pond, and cut down and stubbed up an osier bed of about eight perches in extent.

The parties not agreeing about the title, the bill was filed in the year 1838, for the purpose of compelling the defendant to complete his purchase. The cause now came on to be heard.

Mr. James Russell and *Mr. Greene*, for the plaintiff, insisted, that the defendant, by the acts above stated, which were not according to the usual course of husbandry of the country, and the ordinary occupation and tillage, had waived all objections to the title, and claimed a decree in his favour without a reference for title. They cited *The Margravine of Anspach v. Noel* (1).

Mr. Walker, for the defendant, was not called on.

KNIGHT BRUCE, V.C. did not think the case cited went to the extent of the proposition stated for the plaintiff. He directed the usual reference for title; upon condition, however, that the defendant paid the purchase-money, and all interest due thereon, into court before Christmas.

L.C. }
June 20; } THE ATTORNEY GENERAL v.
July 4, 5. } BOSANQUET.

Charity — Relator — Information — Free School — Master — Interference of the Court — Costs.

Towards the latter end of the 17th century, a free school, for teaching therein the poor children of the parish of B, to read and write English, with a dwelling-house and premises attached, for the use of the master of the school, was established in the parish of B, and a salary of 20l. was made payable to the master out of the donor's lands. The present schoolmaster was appointed in 1801, and had expended a large sum of money in enlarging the dwelling-house, in which he received and instructed boarders; and previously to 1835, the number of poor children of the parish, who received instruction from the master, averaged from six to twelve only. In 1835 the master was, by a temporary arrangement between himself and the principal parishioners, allowed to retain the free school and dwelling-house and premises, for his own use and for the use of his boarders;

and the poor children of the parish, in number between forty and fifty, were, with the approbation of the schoolmaster, thenceforward instructed in the chapel-room of certain alms-houses, situate in the parish of B, instead of the room used for instruction in the school-house (the chapel-room being of more convenient size than the school-room); and, at the same time, another person, by agreement between the schoolmaster and the principal proprietor of the lands within the parish of B. (who had, in divers ways, greatly benefited the charity by his expenditure), was appointed to instruct the poor children; such person receiving the annual salary of 20l., previously payable to the schoolmaster. The 20l. a year was the only fund arising from the charity, and the arrangement entered into between the schoolmaster and the principal proprietor of the lands within the parish of B, was beneficial to the charity. An information having been filed against those two persons, containing strong expressions of ill spirit towards them, and which could not have had in view the benefit of the charity, the same was dismissed with costs.

In charity cases, the Court will withhold its interference in the execution of the trusts thereof, where such would be otherwise than beneficial to the charities; and such a course is of great importance in deterring persons from bringing cases forward, which cannot by any possibility have in view the benefit of the charities.

Although the Court holds a strict hand over charity trusts, to prevent their being the subjects of abuse, it is still its first duty to take care that in carrying out that principle, injury is not occasioned to the objects of the charity.

If, however, in the case of a charity information, the relator has acted in error, and supposed that he was doing his duty as an individual, by coming forward to protect the poor objects of the charity, the Court will be unwilling to deter others from bringing proper cases before the Court, by subjecting the relator to the costs of the proceedings.

Secus, where the relator has filed an information for the purpose of gratifying an ill spirit towards those who are made defendants thereto.

In October 1827, an information was filed at the relation of Thomas F. Paris Fenner,

(1) 1 *Mad.* 310, 315.

against George Jacob Bosanquet and Francis Hill, as defendants thereto, which prayed a reference to the Master to approve of a scheme for the future regulation and government of the free school, and the affairs and concerns of the charity, the subject of the information; the removal of Francis Hill, as master of the free school, and the appointment of a new master in his place; that the defendant Bosanquet might be decreed to do all necessary acts for the purpose of restoring the free school to the school-house and premises originally used and appropriated for the same; and that he might be restrained from permitting or allowing the objects of the charity to be instructed at any other place than at the school-house and premises so originally appropriated for that purpose; and also from interfering in any manner in the appointment of a master of the free school, in the place of the defendant Francis Hill, or in the regulation or government of the said school, or the affairs or concerns thereof.

The following were the facts of the case:—Sir Richard Lucy, Bart., by his will, in the year 1667, “gave 20*l.* a year for ever, out of certain of his manors, to be employed for the erecting and maintaining of a free school in Broxbourne, in the county of Hertford, for teaching the poor children of Broxbourne ‘to read and write English;’ the said school to be ordered in such manner as he had directed to his brother Francis Lucy, whom he appointed to nominate the schoolmaster, and after his death his son-in-law, Sir John Monson, and his heirs, so long as they should be owners of Broxbourne House, but in case Sir John Monson or his heirs should sell the same, then by his (the said Sir John Lucy’s) heirs;” and by the will a power was given to distrain for the yearly sum of 20*l.*, whenever the same should be in arrear. Sir John Lucy died shortly after the date of his will, whereupon a dwelling-house and a school-room, capable of accommodating about thirty children, were built by the direction of the testator’s brother, Francis Lucy, on a piece of freehold ground belonging to Sir John Lucy’s estate at Broxbourne, but the house had been greatly enlarged and improved within the last thirty years. From the time of the establishment of the charity to about the year 1835, the school-room had been invariably used for

the instruction of poor children of the parish of Broxbourne, as directed by Sir John Lucy’s will, and the dwelling-house was appropriated for the residence of the master of the school, and the defendant Francis Hill, the present master of the school, was appointed by Lord Monson. Broxbourne House and estate, which comprised about five-sixths of the parish, were sold by John Lord Monson to Jacob Bosanquet in 1789; and on his death, the same came to his eldest son, George Jacob Bosanquet, the other defendant, by descent, who took up his residence in the parish in 1830. The objects of the charitable bequests had, for a long series of years, been considered to be the male children of poor persons, being parishioners of the said parish, and the relator had been an inhabitant of Broxbourne for ten years past, and was the owner of property in that parish. From the year 1801, when Francis Hill was appointed the schoolmaster, to the year 1835, the number of poor children attending the school averaged from about six to twelve; and the rent-charge of 20*l.* had of late years been generally a good deal in arrear. In addition to the poor scholars, the master had, for many years past, been in the habit of receiving at the school (as his predecessor, Thomas Hill, was accustomed to do before him,) other scholars or pupils for remuneration, some of whom boarded in his house; but since Easter, 1835, no poor children of the parish of Broxbourne had been instructed upon the premises appropriated for the purpose of the free school, the whole of those premises having, since that time, been exclusively used by the master for the reception and instruction of his private scholars and pupils. The defendant Bosanquet was a trustee of certain alms buildings, situate not far from the free-school house, and containing a large room, called the chapel-room, which was conveniently adapted for the purposes of a school, and had been before used for a Sunday school, and also used occasionally before as a day school; and about Easter, 1835, the defendant Bosanquet gave permission for the chapel-room to be used temporarily as an additional school-room for the purposes of the free school, and proposed to the master, Francis Hill, that he should appoint an additional teacher for the purpose of educating the poor free scholars attending

the chapel-room, and should pay the 20*l.*, the amount of his salary, to such additional teacher. Such proposal having been assented to by Francis Hill, a person qualified to discharge the duties of such additional teacher was proposed to Francis Hill by the said defendant Bosanquet, for his approval, and afterwards approved by the former. In consequence of Francis Hill's salary being in arrear for the last two years, the expenses of the teacher had been borne and paid by the defendant Bosanquet, who had also, at his own expense, provided books, stationery, desks, and other conveniences, and coals, for the purposes of the school. After the free school was removed to the chapel-room, gratuitous instruction was extended to the children, generally of the poorer classes, living in Broxbourne and its neighbourhood. The number of poor children latterly instructed at the chapel-room amounted to about forty, and came principally from Broxbourne parish, the others being the children of poor inhabitants of Nazing and Wormley, adjoining parishes. The defendant, Francis Hill, had, at his own expense, laid out between 700*l.* and 800*l.* in repairing the said free-school house, in which he resided, the same, previously to such repairs being effected, being in a poor and dilapidated condition. There was no provision for the repairs of the school-house and premises, nor any provision for the support of the master of the school, beyond the school-house, and the rent-charge of 20*l.*; and the school, at no former period, had been more efficiently conducted than at the time of filing the information, and the poor of the neighbourhood had never before had such opportunities of receiving instruction.

The information contained charges of concert between the defendants, to support and defend the abuses alleged therein, and a charge that Francis Hill was acting entirely under the advice and direction of the other defendant and his solicitor, and was indemnified by the other defendant, with respect to all the matters complained of, and relating to the charity.

A letter, dated the 18th of March 1836, and written and sent by the relator about that time to the defendant Bosanquet, was given in evidence, and contained intemperate language and charges against the defendant of base misconduct on his part in the pro-

ceedings to which he had been a party, and by means whereof the poor children were instructed at the chapel-room instead of the school-room, and the master had been allowed to retain the use of the school-house for his boarders and private scholars.

Mr. Treslove and *Mr. Metcalfe* appeared in support of the information.

Mr. Knight Bruce, *Mr. J. Wigram*, and *Mr. Loftus Wigram*, for the defendants.

The following cases were cited:—

The Attorney General v. Hartley, 2 Jac. & Walk. 383.

In re Berkhamstead School, 2 Ves. & Bea. 134.

The Attorney General v. Clarendon, 17 Ves. 491.

The Attorney General v. Smythies, 2 Myl. & Cr. 135; s. c. 5 Law J. Rep. (N.S.) Chanc. 247.

THE LORD CHANCELLOR.—On a former day I disposed of the case, so far as relates to the defendant George Jacob Bosanquet; and again, on looking over the pleadings and the evidence, I think it is one of the most extravagant cases I ever saw brought against any individual. It appears, that when Mr. Bosanquet came into the parish, he found this charity existing there; but he certainly found the poor people deriving very little benefit from it. It appears, that the master, who received 20*l.* a year for instructing the poor children in reading and writing, to a certain extent performed that duty. He lived in the house appropriated to that purpose, and he received certain pupils; but it appears, that the number of poor children averaged, I think, from six to ten, or from six to twelve. Very little advantage, therefore, was derived by the poor people of that parish. Mr. Bosanquet, in the first instance, was naturally anxious, living in a parish of so large a proportion of which he was the proprietor, to extend to the poor people the benefits of instruction. He had to contend with a master in possession of the house, over whom he had no controul, and who was certainly very inadequately performing his duty to the poor of the parish; and it appears, that he did that which, in the result, has turned out to be highly beneficial to the parish. It appears, that he, very probably by his interference,

induced the master to give up his 20*l.* a year, and removed the school to another place, called the chapel-room, which was the place where it was carried on at the time the original information was filed, because it was found that the room in the school-house was not adequate to receive the number of children that were sent to the school, and that a larger place was required. Another person was appointed to instruct the children, against whom this information rather attempts to raise the inference, than alleges or proves, that he is incompetent for the office to which he has been appointed—not alleging, and certainly not proving, that the party is incompetent to perform those duties, but wishing the fact to be inferred from the allegation contained in the information, that he has been a day labourer. Now, if the party be competent, the circumstance of his not having had the benefit of a better education, and of his having been employed in the laborious duties of a day labourer, only adds to the merit of the individual, who, with all these disadvantages, has qualified himself for the office he fills. There is no proof that he is not qualified; and I think the presumption is that he is perfectly well qualified, because the relator has entirely abstained from adducing any evidence that he is not. I must, therefore, assume, that that part of the case entirely fails; for I do not understand that any evidence is given disputing the qualification of Mr. French, who is instructing the poor children.

Then the case stands thus: that Mr. Bosanquet appoints a master, or causes a master to be appointed, whom I must assume to be qualified; and beyond all doubt this is done through the instrumentality of Mr. Bosanquet, who is not in a situation to make the appointment, not being connected with the charity, and therefore it is done only for the benefit of the parish. It is entirely gratuitous, and only to be attributed to a desire to promote the benefit of the poor parishioners. He first of all obtains the use of a room which is larger than the school-house, and that being obtained, he provides the means himself of fitting up the room for the purpose of having education carried on. The result of which is, that in that parish, instead of between six and ten, the average number of free scholars pre-

viously instructed, there are now between forty and fifty children deriving the benefit of instruction. And in addition to the parish having that advantage, those who are not in the situation of receiving instruction as matter of charity, have the advantage of instruction, in such a form as they are willing to obtain it for their children from the master, who lives in the house belonging to the school. The result, therefore, to the parish is, that there is a school by Mr. Hill, giving instruction to children whose parents are in a situation of life to pay for their education, and forty or fifty children have the benefit of free instruction, through the aid and instrumentality of Mr. Bosanquet. And this relator thinks this a proper case, or rather, (for I will not say that any one can think it a proper case,) he files an information, from the beginning to the end charging Mr. Bosanquet with having done this for views personal to himself, when, from the evidence, it appears that he had not any object in view but the benefit of the parish. A more discreditable proceeding, as far as Mr. Bosanquet is concerned, I have never seen. I have before said, that upon that ground, independently of the want of connexion of Mr. Bosanquet with this charity, this information must be dismissed, with costs, as regards that gentleman.

With regard to Mr. Hill, I have had much more doubt, because it is impossible to say that this charity has been administered, either before the time when Mr. Bosanquet lived there, or since that time, in a way which is creditable to Mr. Hill, the master. Mr. Hill, having received the appointment, (from whatever source he derived the appointment, is not now a matter of inquiry,) was put in possession of the house devoted to the purposes of the charity, and he had 20*l.* a year, the utmost extent to which the income of the charity could be carried, being a rent-charge of 20*l.* a year, not capable of being increased. Commencing the history of this charity at the time at which the evidence begins, no doubt the charity was all but lost to the parish,—and lost to the parish from a cause which, in my experience in this court, I have found continually operating to the prejudice of these charities, namely, by the master taking scholars into his own house, which has the effect of giving him an interest almost

always adverse to the interest of those who are entitled to the benefit of the charity in the shape of instruction. That has frequently been the subject of observation in this place; and I do think it is unfortunate that so much indulgence has been shewn to the schoolmasters who are found in that situation. Undoubtedly, great indulgence has been shewn, when it appears that from long habit, from consent, and from the concurrence of those who have the power of administering and superintending the charity, such a practice had been permitted; and no doubt it would be matter of hardship towards any individual, at once to alter the establishment, so as to preclude him from deriving a benefit which may have formed part of his object in accepting his office, and from which he has derived the means of subsistence during the time he has been master, more particularly when, with a view to carry on that source of emolument to himself, he has expended a considerable sum of money in the improvement of the house, which he could not be expected to have done, if he had looked forward to a time when he should be deprived of that benefit. I think, in the *Manchester School case*, I had occasion to consider that subject; and although I never doubted that great injury arose to the charity from that state of things, yet looking at what had been done by my predecessors, I did not feel myself justified in putting an end to that liberty, the schoolmaster having expended a considerable sum in adapting the house to that mode of enjoying the appointment which he had received. But certainly in this case the charity was all but extinct. When there were only six or ten children out of a parish, which it now appears will produce forty or fifty such individuals, capable of receiving the benefit of the charity, it can hardly be said to have existed for any beneficial purpose. Whether it commenced with the present master, does not appear; but I find, that the present master was in the habit of confining the objects of the charity to those who were legally settled under the poor law in the parish. He might as well have adopted any other description of individuals as the proper objects of the charity. But that might not have been his own rule: he might have found it established before he came there, but it is undoubtedly an abuse, and calcu-

lated to deprive the parish of the benefit of the charity, whosoever may have introduced it. Under these circumstances, the question is, what shall be done with regard to Mr. Hill? and in considering that, I think it is my duty not to consider what is the best mode of executing the trusts of this charity, but in what way the parish will derive benefit from any interference on the part of the Court; because, although it is necessary that the Court should hold a pretty strict hand over trusts of this description, to prevent their being the subjects of abuse, it is the first duty of the Court to take care that, in carrying out that principle, injury is not done to those who are the objects of this charity.

Now, I cannot suggest to myself any mode in which this Court could advantageously interfere, under the circumstances, so as to benefit the parish, by extending the objects of this charity. Supposing I were to interfere, and to declare that the master was to receive these free scholars at his house: I do not find any evidence in the case that he has refused to do so, although certainly his interest is not to receive free scholars at his house. Nor do I believe that it would be advantageous to the poor children to go to his house, where they would have to go to an unwilling master (considering that the presence of those free scholars interferes with the other pursuits that he has), instead of going to a school, which I must suppose to be a well established and a well conducted school, where the free scholars are regularly received and instructed; that is all I could declare. I could only declare, that such was his duty; but he says, that he never has refused to receive them, but a system has been established which has entirely drawn the poor children, desirous of instruction, to another place in the same parish, where they receive instruction. Then, I find, that the whole income of the charity is applied to purposes of education, but that he does not perform the duty himself. The personal superintendence, of which Mr. Hill speaks, must, I think, be considered as of very little value, but I have no doubt, that the superintendence of Mr. Bosanquet is much more valuable to the poor children. Therefore, I consider, that Mr. Hill is in possession of the school-house, which he is employing for purposes of his own; though, undoubtedly,

the result has been beneficial to the parish, as tending to the education of those who do not wish to be considered as objects of eleemosynary education. Then what I am asked to do, I cannot accede to, without feeling that I should be doing injury to the parish. I think, under the circumstances, the course which the Master of the Rolls has adopted, in the cases which have been referred to, is very wise and prudent, and quite consistent with the duty of the Court, that is, to withhold its interference, where it feels that its interference would be otherwise than useful. And this course is not only beneficial to the objects of the charity in the particular case, but, I think, it is of great importance in deterring persons from bringing these cases forward, when they could not by possibility have the benefit of the charity in view. If the Court feels that it cannot now interfere, so as to promote the benefit of those who are the proper objects of the charity, it must have been at least equally apparent to those who, being familiar with the transactions to which this information relates, must have had to consider that before the information was filed; and I can conceive nothing more prejudicial to the objects of these charities, than to hold out to those who may wish to put themselves in the situation of relators, or may wish to have the conduct of an information, that if they can find any single deviation from the strict line of duty prescribed in the foundation, they are safe in bringing it before the Court, without reference to the benefit which the objects of the charity may derive from the exercise of the jurisdiction of this Court. That might lead to a question with regard to the costs of the information, as far as regards the defendant Hill. If, from looking at the pleadings and the evidence, and taking as correct a view as I have been able, of the whole transactions from the commencement of the time to which this information relates, I could satisfy myself that the relator had acted in error—that he had supposed that he was doing a benefit to the parish, and that he thought it was his duty, as an individual, to come forward to protect the poor objects of the charity for their benefit; then, however difficult it might be to suppose that any man should come to such a conclusion, I should be unwilling to deter others from bringing proper cases before the Court, by

subjecting him to pay the costs of these proceedings. But when I see that from the beginning to the end, he could not possibly have had the benefit of the objects of the charity in view, but that it was merely the gratification (and the very language of the information shews that)—that it was merely the gratification of an ill spirit towards those who are made the defendants in this information,—and when I cannot ascribe the filing of this information to any object tending to the benefit of those who are the objects of the charity, but to the gratification of private feeling, I think it is the duty of the Court to deter other parties from embarking in such a speculation. It is clear, that if I were to give the costs of this information, it must destroy the charity for years to come, for, however small the costs of the information might be (the costs of this information cannot be small,)—but however small the costs of the information might be, yet, when they are to be paid out of an income of 20*l.* a year, it is quite clear that it would absorb the whole income of the charity for many years to come. In such cases, therefore, it is the duty of the party to apply to the Court in the cheapest way he can, and that only in a case where it is clear that there is to be some benefit derived to the objects of the charity by the interference of the Court. In the present case, I think, it is apparent that no such object could have influenced the relator; and I think it is my duty, stating what I have stated, with reference to the conduct of Mr. Hill, to dismiss this information, with costs, as against both defendants. But I do not wish to part with this case without the reasons for the course I have taken appearing upon the order itself, that it may not hereafter be said, that upon this case being brought before the Court, the Court refused to interfere, and sanctioned what has taken place in this parish. I propose that the order shall be prefaced by this statement:—"It appearing that the whole of the 20*l.* per annum has been paid by the defendant Hill, for the purposes of the charity, and that a place is now appropriated and used for the teaching of the poor children, the objects of the charity, more convenient than the school-house, occupied by the defendant Hill,"—I dismiss the information, with costs.

WIGRAM, V.C. } LISTER v. BRADLEY.
 Nov. 5, 9. }

Legacy—Vesting.

A legacy given to A, "when or if" he shall attain twenty-one, with a direction that it should be immediately separated from the general estate, and put out at interest in the name of A; and that, till A. attained that age, the interest should be paid to B. for the support and education of A, is a vested legacy.

It is a question of intention. A direction for an immediate separation of the legacy from the general estate, a strong ground of itself for holding it vested.

The petition stated, that J. Lister, of Jamaica, by his will, dated in 1821, gave to Catherine Lister, Eleanor Lister, Elizabeth Lister, and John Lister, his reputed children, by one Eleanor Plunkett, the sum of 1,000*l.* currency each, to be paid to them "when or if" they should attain to the age of twenty-one years. And the testator directed that, in the interim, each sum of 1,000*l.* should be put out to interest on separate deeds in the name or in trust for each child entitled thereto, and that the interest should therein be made payable half-yearly to the said Eleanor Plunkett for their support and education, till each child should respectively attain the age of twenty-one. And the testator, after disposing of certain lands, houses, household furniture, &c., gave all and singular other the residue of his property whatsoever, whether real or personal, to be equally divided, share and share alike, to and amongst his said four reputed children, and he appointed the said Eleanor Plunkett, T. Bradley (the defendant), and three others, executrix and executors of his will. The testator died in 1822; and in September of the same year, a suit was instituted for the administration of his estate. By a decree in that suit it was ordered, that the share of Catherine Lister, who had attained her age of twenty-one years, should be paid out to her, and that what the Master found due for principal and interest on the three remaining legacies of 1,000*l.* each, should be carried over in trust, in that cause, to "the contingent legacy account" of Eleanor, Elizabeth, and John Lister; and that what was found

due in respect of the residuary estate should be carried over in trust in the cause "to the residuary account" of the same three children. On the 28th of January 1840, John Lister died under age; and on the 3rd of July 1840, letters of administration to the estate of John Lister were granted to J. Maule, Esq., as administrator on behalf of the Crown.

This was the petition of the Crown administrator, and it prayed that the sum in court, in respect of the 1,000*l.* legacy, given to John Lister, might be paid out to the petitioner as such administrator, and also the one-fourth part or share of the said John Lister, in the residuary estate of the testator.

Mr. Wray, for the petitioner.—There is no question as to the vesting of the residuary legacy. The only question is as to the legacy of the 1,000*l.*, whether the addition of the words, "or if," so alters the effect of "when," as to make it a contingent legacy. It is contended, that the words, "or if," mean nothing more than "on his attaining," &c.

Mr. Temple, contra.—The gift to the child is limited to the condition of his attaining the age of twenty-one years. The fact of the testator having used no such words in the residuary clause of his will, shews that he meant a distinction; the word "or" is often construed "and," if by such a way of reading the instrument you can arrive at the intention of the testator. Effect must be given to every word of the will as far as possible; but except you read "or" as "and," what explanation can be given to "if"? If the interest of the legacy was given in this instance to the legatee, there would be much more difficulty, but it is given to the mother in the meantime. Besides, the Court has expressed an opinion by ordering it to be carried over to the "contingent" legacy account of each. The Crown is therefore only entitled to one-fourth of this 1,000*l.* legacy, and to one-fourth of the residuary estate.

Mr. Wray, in reply.—"Or" has never been construed "and" to defeat the vesting of a legacy, though it may have been so construed to establish it. The interest was to be paid to the mother, but for the maintenance of the children. There is nothing to take this out of the ordinary cases as to vested legacies.

Nov. 9.—WIGRAM, V.C.—The petitioner in this case is the personal representative of John Lister, one of the reputed children, and a legatee under the will of the testator; and the petition asks, that the sum of 1,167*l.* 3*l.* per cent. Bank annuities, standing to the credit of the cause, “the residuary account,” and 902*l.* like annuities, standing to the credit of the cause, “the contingent legacy account of the infants,” and certain small sums of cash arising therefrom, may be transferred to the petitioner. The first sum represents the share of J. Lister in the residuary estate, and the second the legacy of 1,000*l.* currency. The right of the petitioner to the first sum is not disputed, but his right to the other sum is denied by the respondents, who represent the estate of the testator. The question is, whether the 1,000*l.*, given to J. Lister, vested in him at the death of the testator, or whether it was contingent upon his attaining the age of twenty-one years. If it was a vested legacy, the petitioner is entitled to it; if contingent, it belongs to the estate of the testator. The will gives four legacies of 1,000*l.*—[His Honour here read the words of the will as to these four legacies]. The testator afterwards gives to his said four children and their heirs, certain houses and lands, and adds the following directions as to these devises, “The said messuages and houses to be under the direction of the said Eleanor Plunkett, for the benefit of my four children, till they attain the age of twenty-one respectively.” The testator then gives certain household furniture among his four children, and concludes by giving all other his residuary estate, both real and personal, to his four children, share and share alike. I thought it right to reserve my judgment, not from any doubt, but because it was stated at the bar, that when this case was before the Vice Chancellor of England, his Honour intimated an opinion unfavourable to the vesting of the legacy. That the question now before me was not then judicially under the cognizance of the Court, is clear. The utmost that the Court could then do was, not to prejudice the question; but the statement was sufficient to impose on me the obligation of inquiry. In the argument for the respondents it was said, that the word “if” imported a condition; that the interest of the legacy was not given to the legatees,

but to the mother; and lastly, it was said, that the circumstance that the other bequests to the four children were given in a different form, furnished a strong ground for inferring a different intention. This is a vested legacy. A legacy to A. “at” twenty-one, or “when” he attains twenty-one, is not vested—1 *Rop. on Leg.* 489, 3rd edit. A legacy to A, to be paid to her as soon as she shall attain twenty-one, and in case she lives to attain that age, and not otherwise, is not vested—*Knight v. Cameron* (1). The word “when,” in a will, alone and unqualified, is conditional—*Hanson v. Graham* (2). In each of these cases a strict construction of the words will yield to the intention. Having this distinction in mind, I should be sorry to have to decide this case upon the critical meaning of the words, for it is clear that the words will receive a different construction where the context requires it. Upon the authority of *Hanson v. Graham* and *Branstrom v. Wilkinson* (3), I am bound to hold, that it is a gift of the whole interest for the use of the legatees, even if the gift and the directions to pay were not separate from each other; and independent of the consideration that the testator directed the four legacies to be separated from his general estate, and put out on separate deeds; this of itself is sufficient to fix the construction of the words “when or if,” that they were not used for the purpose of making the interest contingent. Legacies to be separated from the general estate *instantly*, stand in a different predicament from legacies to be separated at some future time. This argument was used by me before, and approved of by Lord Cottenham, in *Sanders v. B.*—(4). The language of the Court in *Vawdry v. Geddes* (5) is to the same effect. The circumstances of the houses and lands being given to the four as a clearly vested interest, and that these, like the four legacies, were placed under the direction of the mother, fortifies my conclusion. The difference in the form of the gift of the residue does not alter my opinion. The reason of that was, to limit the amount to be subject

(1) 14 Ves. 389.

(2) 6 Ibid. 239.

(3) 7 Ibid. 421.

(4) Not yet reported.

(5) 1 Russ. & Myl. 203; s. c. 8 Law J. Rep. Chanc. 63.

to the mother's controul. The order must be made according to the prayer of the petition, which, however, must be amended, by setting out the will at greater length.

V.C. }
July 14. } BAXTER v. PITCHER.

Practice.—Pauper—Notice of Motion—Clerk in Court.

A notice of motion by a pauper must be signed by his clerk in court. See contrà, a case in 2 Keen, 663.

Mr. Glasse moved, upon a notice of motion by a pauper, which had not been signed by his clerk in court.

Mr. K. Bruce objected, and said he had always understood, that a notice of motion by a pauper, must be signed by the clerk in court; there was a case decided by Lord Eldon, *Gardiner v. —* (1), expressly deciding that; but when he looked at his copy of *Vesey*, to his astonishment, he found a note of a case at the Rolls, where the Master of the Rolls appeared directly to have overruled Lord Eldon's decision, and held that it was competent for a pauper to give notice of motion in person—*Perry v. Walker* (2). In that case, the Master of the Rolls said, that he had inquired into the practice, and found it was not considered by the officers of the court essential, that the notice of motion of a pauper should be signed by his clerk in court; and considering the understood practice, and that what had fallen from Lord Eldon had never been made the subject of a general order, the plaintiff was entitled to be heard on the notice of motion which had not been so signed.

The VICE CHANCELLOR.—In those cases before Lord Eldon and the Master of the Rolls, they both seem to have agreed that the practice was different from what they ordered, but that the circumstances warranted a departure from it. That was probably what was meant at the Rolls; and where I find both Judges stating that in

future the practice must be considered so and so, I think I am bound not by what they did, but by what they both acknowledged ought to be done. A person has, otherwise, no protection against a pauper. I have often had occasion to see that what is called protection to a pauper, is nothing more than arming him with power to tyrannize over the rest of mankind. In that case in *Vesey*, the objection was, that the motion had not been signed by the solicitor, so I apprehend it was signed by the clerk in court. Lord Eldon takes occasion to say, "I apprehend the rule as to assigning counsel and a clerk in court to a pauper, is more ancient than the establishment of solicitors in this court, and then, by analogy, the clerk in court ought to sign the notices. I will not turn the party round in this instance, but will permit the motion to be made, desiring, however, that in future it may be understood that such signature will be required." Now the objection was, that the solicitor had not signed, not that the clerk in court had not signed. I must certainly take it, that the motion was signed by the clerk in court. By the report of the case at the Rolls, it appears that the Master of the Rolls is made to speak as if the objection had been that of signing by the solicitor, whereas the objection really was, that it was not signed by the clerk in court. I cannot think that decision right. In *Gardiner's case*, the objection was want of signature by the solicitor, and in the case at the Rolls, want of signature by the clerk in court. I am of opinion, that the notice of motion ought to be signed by the clerk in court.

M.R. }
Nov. 17. } PERRY v. WALKER.

Practice.—Pauper.

A notice of motion, on behalf of a pauper, must be signed by a clerk in court.

Upon a motion, on behalf of the plaintiff, a pauper, for the production of papers, admitted by the answer of the defendant to be in his possession, an objection was taken, that the notice of motion was not signed by a clerk in court.

Mr. Pemberton, in support of the objection.

(1) 17 Ves. 387.

(2) 2 Keen, 663; s. c. 7 Law J. Rep. (N.S.) Chanc. 215.

Mr. Glasse, as *amicus Curiae*, stated the case of *Baxter v. Pitcher* (1), by the Vice Chancellor of England, who refused to hear a motion in that suit, because the notice of motion was not signed by the clerk in court. That the cause of *Gardiner v. —* (2) was cited in support of the objection, and the case of *Perry v. Walker* (3) in opposition. It was also stated, that the case of *Baxter v. Pitcher* had been acted on by Lord Chancellor Cottenham (4).

The MASTER OF THE ROLLS said, he was glad to find that the practice had been revived by the only authority that was competent to revive it. He was informed by the clerks in court, on a previous occasion, that the signature of a clerk in court was formerly necessary, but that the practice of obtaining it had become obsolete.

His Lordship ordered the motion to stand over, to procure the signature of the clerk in court.

L.C. }
July 30. } BATT v. ANNS.

Maintenance—Will—Construction.

A testator bequeathed as follows:—"I leave T. B. under the protection of my wife A. P., to be by her apprenticed and taken care of, and to be provided for to the best of her judgment, as long as the said A. P. remains unmarried:"—Held, that T. B. was entitled to maintenance out of the testator's estate.

The question in this case was, whether the plaintiff was entitled to have maintenance provided him out of the testator's estate, under the following bequest, viz.—
"I, Thomas Parham, give and bequeath to my wife, Ann Parham, whom I make my sole executrix of this my last will and testament, the whole of my personal property, wheresoever and whatsoever, as long as the said Ann Parham remains unmarried. If the said Ann Parham marries again, she shall pay, or cause to be paid, to my illegitimate child, Thomas Batt, the sum of

1,200*l.*, of lawful money of Great Britain, on the day of her marriage. I also leave the said Thomas Batt under the protection of the said Ann Parham, to be by her apprenticed and taken care of, and to be provided for to the best of her judgment, as long as the said Ann Parham remains unmarried."

Mr. G. Richards and *Mr. Chandless* appeared for the defendant Ann Parham; and—

Mr. Rolt for the plaintiff T. Batt.

The LORD CHANCELLOR, after stating the will, said, that after the decisions in *Foley v. Parry* (1) and *Kilvington v. Gray* (2), it was impossible to say that the testator's will did not entitle the plaintiff to the interposition of the Court, for the purpose of obtaining a maintenance out of the testator's estate; that the only difficulty of exercising the jurisdiction arose from not accurately knowing the extent of the gift; that a testator might undertake, if he chose, to discharge the debt of maintenance in favour of an illegitimate child; that in the present case, the testator had marked the limit of his intended provision for the plaintiff; and the difficulty that existed in *Foley v. Parry* was not found in the present case.

The decree, amongst other things, directed a reference to the Master to ascertain the property of the testator at the time of his death, and of the application thereof by the defendant; and what was the surplus after payment of the testator's debts; but his Lordship said, that no direction for maintenance could at present be made, inasmuch as it might possibly be found that there was no surplus estate.

V.C. }
Dec. 15. } CLOUGH v. BOND.

Parties—Limited Administration.

Administration to an intestate's estate is taken out by Mrs. B, whose husband acts for her and by Dixon. Mr. B. and Dixon distribute the estate, and pay the share of the plaintiff, one of the next-of-kin, who is

(1) See preceding case.

(2) 17 Ves. 387.

(3) 2 Keen, 663; s. c. 7 Law J. Rep. (N.S.) Chanc. 215.

(4) See *Emperingham v. Short*, ante, p. 36.

(1) 5 Sim. 138; s. c. 2 Myl. & K. 138.

(2) 10 Sim. 293.

abroad, into a bank in their names, omitting Mrs. B's name. Mr. B. dies, whereupon Dixon draws out the money, and spends it. He then dies, and a bill is filed by the plaintiff, for an account of assets received by Mrs. B. and her husband, and by Dixon:—Held, that an administration ad litem to Dixon's estate is insufficient, but that it is necessary to have a general administration.

This suit was instituted in the month of June 1839, by Captain Clough, on behalf of Mrs. Clough, his wife, against the executors of a Mr. and Mrs. Bond, and Mr. R. Dixon, for an account of the personal estate and effects of Mrs. Anne Dixon, deceased, intestate, possessed by Mrs. Bond, as administratrix, and Bond her husband acting for her, and R. Dixon as administrator also of the estate of the said intestate. The object of the bill was to ascertain the residue of such estate, and to make the representatives of Bond liable for any *devastavit* committed against such estate by R. Dixon, through his negligence; part of the residue had been ascertained and allotted to the next-of-kin previous to the suit; the share thereof belonging to Mrs. Clough was 988*l.*, who, being in India with her husband, could not receive it herself; the whole ascertained fund amounting to 17,000*l.* and upwards, had been converted into cash for the purposes of division, and all had been paid to the parties entitled, excepting the share of Mrs. Clough, which was paid into Messrs. Child's bank, by Bond the husband and R. Dixon, to await an order from India for its payment to Captain Clough's agent. It remained there in Bond's and Dixon's names only, the wife's name being omitted. Bond then died, whilst the share of Mrs. Clough still remained at Messrs. Child's, and thus the whole controul of the fund was obtained by R. Dixon, who, in the month of October 1832, drew it out, and applied it to his own use. In January 1834, Captain Clough arrived in England, and filed his bill, and a decree was made in the cause by his Honour the Vice Chancellor (1). This was appealed from, but heard and affirmed by the Lord Chancellor (2). Previous to the decree of the Vice Chancellor

Mrs. Clough had died in India, and consequently the proceedings taken became nugatory. A bill of revivor was then filed by the parties administering to Mrs. Clough's estate, but when the cause came on it was discovered that the defendant R. Dixon was also dead, and his Honour thought it necessary to have his representatives before the Court. The cause stood over for that purpose, and Captain Clough permitted the suit to be prosecuted by the representatives of his wife, Caleb Collins and Elizabeth Collins, who had administered accordingly, and whose letters of administration stated, that they administered to the use and in trust for Captain Clough. They then filed a supplemental bill against Mary Collins, who had taken out administration *ad litem* to Dixon's estate, for an account against her, as if R. Dixon had originally appeared.

The cause now came on for hearing; and one objection raised was, that the limited administration taken out by Mary Collins was not sufficient, and that the defendants, the representatives of Mrs. Bond, were interested in having a general administrator of R. Dixon before the Court; that such administrator was answerable under the original bill for receipt of the estate of the intestate, Anne Dixon.

Mr. Whitmarsh, Mr. Girdlestone, and Mr. Whitmarsh, jun. for the plaintiff.

Mr. Richards, Mr. Walker, and Mr. Rolt, for the defendant.

Cases cited:—

Munch v. Cockerill, 8 Sim. 219; s. c.

9 Law J. Rep. (N.S.) Chanc. 153.

Knight v. Knight, 3 P. Wms. 330.

THE VICE CHANCELLOR.—This bill, seeking to make the representative of Mr. Bond answerable for a *devastavit*, with respect to a given portion of Anne Dixon's estate, asks in general terms for an account of the testatrix's personal estate, and that cannot be, without having an account of the receipts of R. Dixon. My difficulty is, that I do not see how you can have an account of receipts by Dixon from a limited administrator. You ask, in the first instance, that the assets of the testatrix shall be applied in payment of her debts. To do that, it is necessary to determine what is the share of the plaintiff; and to ascertain what the assets of

(1) 3 Sim. 594.

(2) 3 Myl. & Cr. 400; s. c. 8 Law J. Rep. (N.S.) Chanc. 51.

the testatrix were, you must take an account of the assets received by R. Dixon. As to the original decree, it is stated, the decree did direct account of assets, and did order that what in taking the account should appear to have come to the hands of Mrs. Bond and her husband, and Dixon, should be answered by them respectively. I think, to determine the right of the plaintiff to any thing, I must first take an account of assets received not only by Mrs. Bond and her husband, but also by Dixon; and I do not see how a limited administrator of Dixon can be the person against whom the account is to be taken. The case must stand over for amendment, or for the plaintiffs to file a supplemental bill, if so advised.

V.C. }
Dec. 18. } EVERET v. PRYTHERGCH.

Exceptions—Scandal and Impertinence.

Where in a bill filed by creditors for the administration of an estate, and for an injunction to restrain the executor from acting in the trusts of the will, the plaintiff states generally, that the executor is of bad character and drunken habits, and unfit to act as executor, it is not scandalous or impertinent in the plaintiff to strengthen his case, by stating the particular acts of misconduct complained of.

This bill was filed by the creditors of Richard Medley, deceased, against Thomas Prythergch, and Mary his wife, who was sole executrix of the testator's will, which was dated the 1st of December 1840; and it prayed that an account might be taken of the personal estate of the testator, and of the debts due to the plaintiff and the other creditors, and that a receiver might be appointed of the testator's estate, and that the defendants Thomas Prythergch, and Mary his wife, might be restrained by injunction from taking possession of, collecting, receiving and getting in the personal estate and effects of the testator, or any part thereof. The injunction was granted on the 2nd of August 1841, and the cause was referred to the Master. Exceptions for scandal and impertinence were then taken by the defendants to the bill.

The first exception was to a part of the bill, which charged, that the defendants Thomas Prythergch, and Mary his wife, were persons wholly unfit to be trusted with the execution of the said will, "and that they were of bad character, and drunken habits, and in a state of great poverty." The other exceptions were to parts of the bill, which went to substantiate the above charge, and were to the following effect:—"That the defendant Thomas Prythergch, never had more than a few shillings in his pocket at a time, and went about very shabbily dressed, his clothes torn and his shoes worn out; that both the defendants were very often drunk, sometimes as much as five nights in the week; that the quarrels between the defendants made them a nuisance to the neighbourhood; that their characters were well known as of the worst description; that Thomas Prythergch practised the law in the name of an attorney, with whom he was clerk; that he had stated his willingness to perjure himself upon any occasion of his client requiring it; that he said he had recently procured two false witnessses in a cause; that the defendants were notorious for their drunken and disorderly habits; that they were often violent and outrageous in their conduct; that Thomas Prythergch had stripped his wife of all her clothes and pawned them; that he was notorious for pawning his dress."

The Master by his report certified, that the plaintiff's bill was scandalous and impertinent in all the points excepted to, except the first; to this report an exception was taken by the plaintiff, which now came on for hearing.

Mr. Girdlestone and *Mr. Barker*, in support of the bill.—The question arising here is, whether in a bill filed by creditors against the legal personal representative of a testator, the creditors have or not a right to bring forward circumstances affecting the moral conduct of that representative, to shew he is not a fit person to be trusted with the property. The case of creditors is different from that of legatees under a will. If a testator has chosen to appoint a person to act in the trusts of his will, those who come in under the will cannot complain, but in the case of creditors who claim adversely, when they find the property is in the hands of a person guilty of such circumstances as are divulged in this bill, it is quite right that they should

endeavour to get him removed. The question is, not whether the matter is scandalous in itself, but whether it is relevant to the matter in question; no statement is scandalous, if it be one which on decree or interlocutory application, the Court may consider necessary for the purpose of the order to be made. The first exception the Master has disallowed, and admits is not scandalous; therefore, he thinks it is not scandalous to say, that the defendants are of bad character and drunken habits. Then comes the question, whether it is not also relevant to inquire into those particular acts of misconduct complained of. Although there might be enough to shew a case against them, on the first part of the bill excepted to, still there is no reason for saying, the case may not be made stronger by all the acts of bad conduct being stated.

Mr. Richards and Mr. Romilly, contra.—It may be very relevant to state, that a defendant is an improper person by reason of his bad character, but it never could be of the slightest use to state, that persons have no money in their pockets, or shoes on their feet; for these facts do not injure their moral character, and if the testator thought fit to place them in the position of executor, no one has a right to object to them on the grounds here stated.

The VICE CHANCELLOR.—I must differ with the Master in his opinion. It is a delicate part of the jurisdiction of this Court to determine, how strong the plaintiff may make his case. The plaintiff supports his case by stating many circumstances of misconduct in the character of the defendants, and this Court never would prevent him from doing so, merely because some alone of those circumstances would have been sufficient. It is not for me to say to the plaintiff, you have gone into so many more matters than enough for your case. The plaintiff has filed his bill to have the estate of a deceased person administered, and the debts paid; and he represents that it is fit for the Court to interfere by injunction, that the executrix and her husband may be restrained from acting, and that a receiver may be appointed. He states in a general way, that the husband and the wife, as executrix, are persons of bad character, and to support that, many instances are given to shew the fact of bad conduct in respect of drunkenness and

violent behaviour. I think the plaintiff has a right to make his case as strong as he can; and surely it is not unimportant for that purpose to shew, that a person is of a violent and outrageous character. It is the duty of an executor to make out debts, to pay debts, to settle demands of all sorts. Now, I do think, if it is generally proved that there is such conduct as this, on the part of a man intrusted with that department, it is also material to enter into particular instances of that violent and outrageous conduct. As to the fact of drunkenness, it is obvious, that assets cannot be safe in the hands of persons who are generally drunk. The plaintiff has stated a case, which, if proved at the hearing, might form good ground for an injunction, and is therefore material evidence for the Court in making a decree. It is a singular thing, that the Master should have thought it right, that a general statement as to conduct should be sufficient, and should object to all those things which shew in detail what was before stated in general terms.

V.C. }
Dec. 21. } HUDSON v. MADDISON.

Misjoinder of Plaintiffs—Injunction.

Bill filed by five plaintiffs in respect of different tenements and separate interests, for an injunction only, to restrain a nuisance affecting all the plaintiffs equally:—Held, upon motion to dissolve the injunction, which was obtained ex parte, that as no decree giving separate relief to the plaintiffs, could be made at the hearing, an objection for misjoinder, such as might have been taken on demurrer, would hold, and the injunction could not be continued.

In this case, a bill was filed by Thomas Hudson, Charles Cave, John Orme, Field Flowers Goe, and James William Wilson, against Charles Maddison and Thomas Hawksworth, for an injunction to restrain them from erecting a chimney for a steam-engine and saw-mills, to be worked thereby, upon premises contiguous to the plaintiffs', the same being likely to become a nuisance. The bill stated, that the plaintiffs were owners and occupiers of houses and offices situate in the town of Louth, in Lincolnshire,

varying from 1,000*l.* to 1,600*l.* value each; that the defendants had lately purchased a piece of waste land adjoining in part the garden of the plaintiff Thomas Hudson, and a short distance from all the plaintiffs' residences; that the defendants having commenced erecting saw-mills and a steam-engine to work such mills, upon the said piece of land, and there never having been such a thing as a steam-engine or manufactory before erected in the said town, but at some distance therefrom, the plaintiffs severally served notices upon the defendants, to the effect generally, that if such works as were contemplated were continued, legal proceedings, either in the form of injunctions, or indictment for the nuisance, would be immediately instituted against them. These notices were followed up by letters from some of the plaintiffs to the same effect. The bill went on to state, that the defendants took no notice of these communications, but proceeded in the erections complained of, and concluded by praying for an injunction only, to restrain them from so doing.

The injunction was granted *ex parte*.

Mr. Bethell and *Mr. O. Anderson*, for the defendants, moved to dissolve the injunction.—This injunction would not have been granted, had it been then known how the bill was framed. These five plaintiffs occupy each a separate private residence of his own in the town of Louth, and having no common interest, join themselves in the same bill. It is clearly multifarious, and a decided misjoinder. The cases of—

Jones v. Garcia del Rio, Turn. & Russ. 297;

Cowley v. Cowley, 9 Sim. 299; s. c. 7 Law J. Rep. Chanc. 259;

Spencer v. the London and Birmingham Railway, 8 Sim. 193; s. c. 7 Law J. Rep. Chanc. 281;

Sampson v. Smith, 8 Sim. 272; s. c. 7 Law J. Rep. (N.S.) Chanc. 260;

The Attorney General v. Forbes, 2 Myl. & Cr. 123;

all go to shew that such an application as the present cannot be maintained, even at the hearing. It should have been in the form of an information.

Mr. G. Richards, for the plaintiffs.—This case is argued in the same manner as

if it had come on upon demurrer; the time for demurring has long passed, and as the defendants have not taken advantage of their right to demur, it cannot be argued in this way, upon motion to dissolve. The defendants have never denied that there will be a nuisance: and why may not one person sue on behalf of himself and all other persons who are affected?

Mr. Koe, on the same side.

The VICE CHANCELLOR.—The only question really is, whether the authority of Lord Eldon in *Jones v. Garcia del Rio* applies to a case like this. When the Attorney General files an information representing the whole of the community, and wherein many persons join as relators, and represent themselves as suing on behalf of themselves and all other persons affected, they are only, by thus adding themselves as parties, doing that which the Attorney General, as the informant on behalf of the public, has already done for them; but whether in a case where several parties, as in the present case, have separate interests, as regards the matter complained of, and they file a bill, the Attorney General not being made a party to it, praying a general decree as to that thing which separately affects each—whether that bill could be sustained, is a matter upon which there was formerly some fluctuation of opinion. When the case of *Cowley v. Cowley* was argued before me, I was furnished with some notes of cases, in which Lord Bathurst had, upon the hearing, dismissed those parties from the suit, who had no interest in the matter, and gave relief to those who had. I conversed with Lord Cottenham upon the case of *Cowley v. Cowley*, and his Lordship expressed an opinion, which agreed with my decision in that case. Now, how does the matter stand here? The bill is filed by five persons, each having a separate tenement, and they represent that the erecting of this steam-engine and chimney by the defendants, will have an injurious effect on the whole of these tenements. They all join in putting their cases to the cases of the others. If, upon such a bill, a decree is made, it must be such a decree as would give relief in each of the five separate cases. Then I conceive the law, as it now stands, to be such, that no relief could be given. The present bill

asks no relief, but only for an injunction. Now, if this injunction, so obtained, could not be sustained at the hearing of the cause, why should the Court now continue it? There is the special authority of Lord Eldon for taking objections, which would have formed ground for originally demurring to the bill, upon a motion like the present; and if a party has a right so to do, and he chooses to exercise that right, the Court is bound to entertain the objections. The injunction in this case must, therefore, be dissolved.

V.C. }
Nov. 13. } BROWNE v. BROWNE.

Legacy—Ademption—Settlement—Lunatic.

*A testator having left his son 10,000*l.* by his will, expressed an intention verbally of settling 10,000*l.* stock on the son's marriage, and then became insane. The marriage took place, and the 10,000*l.* stock was purchased out of the testator's monies, and settled accordingly. The testator then had a lucid interval, and, on being told of the transaction, did not disapprove thereof. He afterwards became irrecoverably lunatic:—Held, first, that the testator confirmed the settlement upon his son by not expressing any disapprobation during this lucid interval; and, secondly, that the evidence did not prove that the settlement of the 10,000*l.* was an ademption of the legacy.*

By a decree on the hearing of this cause, it was referred to the Master, to take an account of the estate of the testator. The Master reported, that the testator, Augustus Browne, by his will, dated the 28th of October 1829, after appointing his son, P. A. Browne, and Barwell Browne, and another who disclaimed, executors of his will, and after making a disposition of certain stock in favour of his wife for life, and afterwards two-thirds to his son, Philip Augustus Browne, and one-third between his two daughters, Anne Browne and Margaret Williamson, and after stating that he had recently, on the marriage of his daughter Margaret, advanced her, as a marriage portion, the sum of 10,000*l.*, in order to place his son P. A. Browne and his daughter Anne on an equal footing with Margaret, gave to each of them, P. A.

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Browne and Anne Browne, the sum of 10,000*l.*; and the testator gave the residue of his estate, in equal portions, between his three children. The Master found, that the testator died in January 1836: that in March 1831, P. A. Browne was desirous of making a proposal of marriage to his present wife, upon which the testator intimated to him that he would make a settlement of 10,000*l.* stock upon his marriage; and that he had no doubt he would make up his income to 1,000*l.* per annum: that upon the application of Colonel St. Clair, a mutual friend of the testator and of Sir Charles Rich, the intended bride's father, the testator stated, that he would immediately settle upon his son the sum of 10,000*l.*, 3*l.* per cent. stock, and that he would make up the income equal to 1,000*l.* per annum; and that should his son and his intended wife find themselves straitened, he might be inclined to increase the allowance: that the testator frequently expressed to Barwell Browne his intention of settling 10,000*l.* upon his son on his marriage: that in April 1831, before the settlement could be finally arranged, the testator became of unsound mind, and incapable of managing his affairs; and that he was, under proper medical advice, separated from his family, and placed under the care of Dr. Willis: that Barwell Browne, knowing it had been the intention of the testator to make such settlement of the sum of 10,000*l.* stock, and being aware of what had passed between the testator and Col. St. Clair, and that the same had been communicated to Sir Charles Rich, purchased, with the sum of 8,412*l.* 10*s.*, part of the money belonging to the testator, the sum of 10,000*l.*, 3*l.* per cents., which sum was accordingly transferred into the names of Barwell Browne and William Rich, as trustees, under an indenture of settlement, dated the 9th of May 1831, made upon the marriage of P. A. Browne: that the marriage was solemnized on the 2nd of June 1831: that in the month of October 1831 the testator had almost recovered from his unsound state of mind, and was then perfectly capable of understanding and attending to matters of business: that Barwell Browne informed the testator of the arrangement respecting the settlement upon the marriage of his son, and the testator had fully understood the transaction, and did not

dissent from or express any disapprobation of the aforesaid purchase of 10,000*l.* stock; and that the testator approved of the settlement: that the testator had a relapse towards the end of the year 1831, and in the spring of 1832 was considered irrecoverable: that a commission of lunacy was issued against him on the 3rd of May 1834, under which he was found of unsound mind from the 1st of January 1832; and he continued to be of unsound mind till his death: that P. A. Browne had retained out of the testator's estate the sum of 1,587*l.* 10*s.* only, in part satisfaction of the legacy of 10,000*l.*, it being contended, on the part of the legatee, that the sum of 8,412*l.* 10*s.*, so advanced for the benefit of P. A. Browne, must be considered as part satisfaction of the 10,000*l.* bequeathed to him by the testator's will, but that P. A. Browne had, by his state of facts, charged, that the said sum of 8,412*l.* 10*s.* was due to him on account of his legacy, and had been improperly divided as part of the testator's residuary estate, to be paid over to the residuary legatees; and that the sum of 5,608*l.* 6*s.* 8*d.*, being two-thirds of the sum of 8,412*l.* 10*s.*, ought to be refunded and paid to the said P. A. Browne, in satisfaction of the legacy; but there being no direction in the decree for him (the Master) to make any inquiry respecting the sum of 8,412*l.* 10*s.*, he had not allowed the defendant's state of facts.

The case now came on upon further directions, and upon the petition of P. A. Browne, praying that it might be declared that the testator approved and confirmed the application of the sum of 8,412*l.* 10*s.* in the purchase and settlement of 10,000*l.* stock upon his marriage; and praying that he might be declared to be entitled to the legacy of 10,000*l.*, in addition to the sum of 8,412*l.* 10*s.*

An affidavit of Colonel St. Clair, which accompanied the petition, confirmed the state of facts contained in the Master's report set forth in the petition, relating to the conversations which took place between him and the testator as to the marriage of his son, and stated, that the testator frequently, in the presence of him and Mrs. St. Clair, with reference to the distribution of his property, said, that his affairs were by no means settled; that he intended to alter his will very much in favour of his

son; that he wished each of his daughters to have 600*l.* a year; and that the rest of his property should go to his son.

The first question argued was, whether the fact of the testator not having dissented from the settlement of the 10,000*l.* stock when he became of sound mind, could be construed into an assent; and, secondly, if the Court should consider the settlement to have been confirmed, whether it was not an ademption of the legacy.

Mr. Bethell and *Mr. Piggott*, for the petitioner, upon the question of ademption of the legacy, cited—

Debeze v. Mann, 2 Bro. C.C. 165, 519.

Trimmer v. Bayne, 7 Ves. 518.

Robinson v. Whitley, 9 Ibid. 577.

Mr. Wakefield and *Mr. Toller*, for Mrs. Williamson and her daughter, cited 1 *Rop. on Leg.* edit. by White, 318.

Mr. Ellis for Anne Browne.

Mr. F. J. Hall for Barwell Browne.

The VICE CHANCELLOR.—The first question is, whether there was such an acquiescence by the testator in what was done by Barwell Browne as to make it the act of the testator, Augustus Browne. It is acknowledged, he could not be bound at the time of the marriage, from his state of mind: a difference, however, took place in the autumn of 1831; and it appears, from his nephew's evidence, that his state of mind then was materially changed. He might be capable of attending to matters of business, though not quite recovered; and if so, he might be supposed to approve, because he did not disapprove. I think silence gives consent. All parties allow that he understood the transaction; and I think it must be taken that he confirmed it.

On the second question, I think there is no ground for not giving the fairest effect to this evidence of Col. St. Clair. There is no ground for supposing inaccuracies in his testimony; and I must say, that there is nothing on the face of the will that makes it at all unlikely to have so happened that the testator would have expressed himself as Col. St. Clair represents him to have done. Upon the face of the will, so far from there being equality, it is manifest to me, that he did intend the most marked inequality between his son and his two

daughters. By the settlement, the sum of 10,000*l.* stock was held upon these trusts, viz. to his wife for life, two-thirds of it to his son, and the other one-third to be divided between his two daughters. Then, the testator, by his will, directs, that over and besides a sum of 6,000*l.* to which he refers, so much money shall be then invested as, together with the 6,000*l.*, will produce 1,200*l.* per annum: then the testator provides, that the non-advancement of a further sum to Margaret shall not affect the others, to whom he gives 10,000*l.* each, so that there might be an equality of division. Then the testator, in giving the residue, gives it subject to his debts, and the legacies given by his will, or which he might give by a codicil thereto. This distinctly shews that he did not mean a final arrangement of his property—confirming Col. St. Clair's statement that his mind was unsettled, that being the case in March 1831. The marriage of the son was set on foot; and then, according to the passage about the conversation between the father and son, it is natural that the father would, in the first instance, say, "I have settled 10,000*l.* on Margaret, and I will do the same to you." That was what he thought would be the least he could do; but then, it appears, it was not all he meant to do, which is shewn by his referring to plate, wine, &c. In these conversations with Col. St. Clair, the testator repeatedly stated that he intended to make an alteration greatly in favour of his son. Now, these conversations, which were simultaneous with the act said to be done, were evidence to rebut the presumption at law; and the testator, so far from meaning that the advancement should be an ademption, declares his intention to increase the benefits to his son, and not to nullify those given by the will. I think it is a plain case for saying, that the conversations with the testator at the time of the advancement are sufficient to shew his intention that his son should have the testamentary benefit at least, and also the other advancement; this is therefore no case of an ademption.

I had occasion lately to look into the books upon civil law, as to this question of ademption, which has always been said to emanate from the civil law, but it is remarkable how very few passages in the civil law relate to the subject.

V.C. }
Dec. 7. } YEOMAN v. COODE.

Mortgagee—Production of Documents.

A mortgagee, having, in his answer to a bill to redeem, set out his mortgage deed, cannot be compelled to produce documents admitted to be in his possession relating to his title as mortgagee.

A bill was filed by the administratrix of a mortgagor to redeem. The defendant, in his answer, set out the mortgage deed very fully, and admitted, that he had certain deeds and documents in his possession, and set out a list of them in the second schedule to his answer, but refused to produce them, stating, that they related to his title as mortgagee.

Mr. Forster, for the plaintiff, moved for the production of the deeds admitted by the answer of the defendant to be in his possession, some of which were receipts for premiums of insurance, receipts for repairs, accounts of payments made in respect of the mortgaged premises, and letters and copies of letters relating to the premiums; and cited—

Ex parte Caldecott, Mont. 55.

Latimer v. Neate, 4 Cl. & Fin. 570.

See also *Sparke v. Montriou*, 1 You. & Col. 103; *Beaumont v. Foster*, 5 Law J. Rep. (N.S.) Chanc. 4.

Mr. Bacon appeared for the defendant, and resisted the production.

The VICE CHANCELLOR refused to order the production of these documents.

M.R. }
Nov. 11. } ALLEN v. M'PHERSON.

Will, Revocation of—Legacy—Parties.

A testator, by his ninth codicil, revoked certain benefits which he had given by his will and eight previous codicils to the plaintiff and other persons. Upon a contest in the ecclesiastical court, the will and nine codicils were admitted to probate, whereupon the plaintiff filed a bill, charging that the testator executed the ninth codicil through the fraud which was practised upon him by the defendants, the executors, and praying for a declaration that he might be entitled to

the bequests made to him by the testator in his will and eight first codicils, notwithstanding the revocation of the bequests by the ninth codicil, and that the defendants, the executors, might be held to be trustees for the plaintiff to the extent of such bequests.

Demurrer, for want of equity and for want of parties, overruled.

John Allen, of Highbury Place, Islington, by his will, dated the 11th of December 1834, gave and bequeathed to the plaintiff, and Susannah Allen, spinster (since deceased), and Thomas Allen, children of his nephew Thomas Allen, deceased, the sum of 4,000*l.*, equally to be divided amongst them, share and share alike; and after various bequests, and particularly a bequest of the sum of 20,000*l.* new $3\frac{1}{2}$ *l.* per cent. annuities, upon certain trusts, in favour of his daughter, Susannah Evans, one of the defendants, he gave and bequeathed all the rest and residue of his estate and effects, upon the same trusts as were declared of the 20,000*l.* new $3\frac{1}{2}$ *l.* per cent. annuities. And the testator thereby appointed Richard M'Pherson and Samuel Tomkins (two of the defendants) to be the executors and trustees of his will.

The testator afterwards made nine codicils to his will, the fourth of which was dated the 16th of November 1836, and was in the following words:—"Whereas I am desirous, in the event of my daughter, Susannah Evans, dying in the lifetime of her husband, George Evans, to increase the provision hereinafter made for the undermentioned persons; I hereby give and bequeath to Susannah Allen, daughter of my late nephew Thomas Allen, 3,000*l.*; Thomas Allen and the plaintiff, sons of the said Thomas Allen, 2,000*l.* each; and to John Allen, son of my nephew Charles Allen, the sum of 2,000*l.*; the same monies to be paid as soon as conveniently after my decease, in addition to the legacies hereinbefore mentioned."

The testator, by his sixth codicil, dated the 22nd of March 1837, gave and bequeathed to the plaintiff, one-fourth of the clear residue of his estate and effects, to and for his own use and benefit.

By his seventh codicil, the testator appointed William Allen (one of the defendants) to be a trustee and executor with his former trustees and executors.

The testator, by his ninth and last codicil, dated the 3rd of October 1837, after revoking the legacies given by his will and codicils to and in trust for his nephew Charles Allen and his children, and the child or children of his deceased nephew Thomas Allen, declared that they should take no further or other benefit under his will, or any codicil or codicils thereto, save and except as therein mentioned; and he thereby gave unto trustees therein named the sum of 1,000*l.* sterling, upon trust, to invest the same, and to receive the dividends, and pay the same unto his nephew Charles Allen and his wife, during their lives, and the life of the survivor of them; and afterwards to fall into and form part of his residue. And the testator thereby gave and bequeathed unto Nathaniel Bartlett, Susannah Evans, and William Allen (one of the defendants), the sum of 400*l.* sterling, upon trust, to invest the same in their names, or in the name of the survivor of them, and to pay the same unto Susannah Allen, at such time as she might marry, with consent of the said trustees, or the survivor of them, or at such time as the said trustees might think proper. And after bequeathing the sum of 300*l.* to Thomas Allen for his own use and benefit, he thereby directed his executors, as soon as convenient after his decease, to purchase and invest in the names of Nathaniel Bartlett, Susannah Evans, and the defendant William Allen, the sum of 800*l.*, $3\frac{1}{2}$ *l.* per cent. consolidated annuities, for them to receive the dividends thereof, and to pay the same by equal weekly instalments unto the plaintiff during his life, or until he should attempt to sell or otherwise dispose of the same, and in such case, he declared that the same should fall into the residue of his personal estate.

The testator died on the 28th of November 1837, leaving his nephew Charles Allen and his children, and the plaintiff, and Susannah Allen, and Thomas Allen, the children of Thomas Allen, deceased, another nephew of the testator, him surviving.

The will and nine codicils were proved by the defendants, Richard M'Pherson, Samuel Tomkins, and William Allen, in the Prerogative Court of Canterbury.

The bill stated, that the testator was born in 1760, at East Chinnock, Somersetshire, and that, at the date of his will, he had

acquired a fortune of almost 80,000*l.*, as a wholesale provision-merchant at Queenhithe. The bill then stated, that the testator had cohabited for many years with one Mary Butler, and that, during such cohabitation, he had one son by her, the defendant William Allen; that he afterwards intermarried with her, and that Susannah Allen, afterwards Susannah Evans, the wife of George Evans, two of the defendants, was the only child of the marriage. The bill further stated, that about the year 1824, a separation took place between the defendants, Susannah Evans and George Evans, and that Susannah Evans lived with the testator thenceforth up to the time of his death. The bill then alleged, that the mind and intellects of the testator, during the latter months of his life, became generally weak, and that he was incapable of managing his own affairs; that during this time his daughter, Susannah Evans, obtained an absolute power and controul over him; and that, in this state of things, having been informed of the contents of the sixth codicil, she formed a scheme to avail herself of her influence, and in execution of that scheme, she caused a written report of several matters prejudicial to the plaintiff and the rest of his family to be presented to the testator; that the report was read to the testator, and that the defendant William Allen afterwards took it to the solicitor of the testator, who immediately prepared the ninth codicil, which was executed the same evening. The bill then proceeded to state transactions, with various circumstances, tending to shew that the testator had always manifested a great interest in his native place, East Chinnock, and in the welfare of the plaintiff, and the other members of his family who lived there; that he had frequently expressed himself favourably inclined towards the plaintiff, personally, and by letter; and that in March 1837, shortly before the execution of the sixth codicil, the testator assured the plaintiff, and his brother Thomas Allen, that he had handsomely provided for them. The bill then charged, that the affection of the testator was unabated towards the plaintiff, until the defendants, Susannah Evans and William Allen, caused the fraudulent and untrue report to be made to the testator; and that by such fraudulent and untrue report only, the testator was prevailed upon

to execute his ninth codicil, and that he signed it without the contents having been read over to him, and without any draft having been presented to him. The bill then stated, that the plaintiff had ineffectually attempted to prevent probate of the ninth codicil in the ecclesiastical court, but that he was confined to the objection which affected the said will and codicils as an entire testamentary instrument; and it prayed a declaration, that the plaintiff was entitled to the several bequests and legacies given to or intended for him by the testator, in and by his will and other codicils, or any or either of them, without revocation thereof by the ninth codicil; and that the defendants, Richard M'Pherson, Samuel Tomkins, and William Allen, or Susannah Evans, are or is trustees or trustee of or to the extent of such bequests and legacies for the plaintiff; that an account might be taken of all the personal estate and effects of the testator, possessed by the defendants, or any or either of them, and of their, or any or either of their, application thereof; and that the proportion to which the plaintiff might be declared entitled in the legacy of 4,000*l.*, bequeathed by the testator in his will to the plaintiff, and Susannah Allen, and Thomas Allen, might be paid the plaintiff out of such estate; and that the legacy of 2,000*l.* in the fourth codicil, in case the defendant Susannah Evans should die in the lifetime of her husband, might be invested in the names of trustees for his benefit, and that the clear residue might be ascertained, and one-third paid and transferred to the plaintiff for his use and benefit.

The defendants, Richard M'Pherson, Samuel Tomkins, and William Allen, put in a general demurrer to the bill, and the whole of the discovery: first, for want of equity; and secondly, for want of parties, because the plaintiff had not made Nathaniel Bartlett a party to the bill, or prayed process against him.

Mr. Kindersley, Mr. J. Russell, and Mr. Gifford, in support of the demurrer.—The bill puts the relief it prays upon the ground of undue influence exercised upon the testator by some of the defendants, by means of a false representation contained in a written report, which was detrimental to the character of the plaintiff; and the result of which was, that the testator was induced

to execute a ninth codicil, which revoked the previous gifts to the plaintiff. The will and nine codicils have been admitted to probate in the ecclesiastical court, and even supposing the testator to have been hindered, by means of the alleged false representation, from exercising a fair, unbiassed purpose of bounty, the ecclesiastical court is nevertheless competent, and that it is the proper and exclusive tribunal to decide on the validity of the will and codicils. The duty of this Court is to put a construction on and give effect to the will of a testator; but it has never assumed an authority to decide that a will, which has been duly proved in the proper ecclesiastical court, is not the will of the testator. There are cases where a testator has been prevailed upon to confer a benefit upon a person in an assumed character, in which the Court has interposed its authority, on the principle that the intention of the testator was known at the date of his will; but none of them have gone so far as to create an intention for the testator, different from that expressed by his will, and to declare a legatee under it a mere trustee of other parties. This demurrer must also be allowed for want of parties, because Nathaniel Bartlett, who is a trustee of the 400*l.*, under the ninth codicil, for the benefit of the plaintiff, is not before the Court, and because the bill prays an account of all the personal estate and effects of the testator.

Mr. Pemberton and Mr. Jolliffe, contra.

—The plaintiff admits the jurisdiction of the ecclesiastical court, and the legal validity of the will and nine codicils; and he does not come here to substantiate his case on the validity or invalidity of the will and nine codicils as a testamentary instrument, or on the construction of it, but on certain allegation of circumstances, the effect of which is, that inasmuch as the revocation of the will and eight codicils was brought about by the fraud of some of the defendants, the Court will declare them to be trustees for the plaintiff, to the extent to which he would have been entitled to the benefit of them, in case that codicil had not been executed. If the facts alleged are true, there can be no doubt that the plaintiff is entitled to the relief he prays; for to say that parties shall be benefited by their own fraud, will be subversive of justice and

equity. The argument on the other side is, that the ecclesiastical court was competent to examine into the validity of the ninth codicil, and therefore this Court has no jurisdiction; and that, at all events, its jurisdiction ought not to be called into operation, because of the clear intention on the face of the ninth codicil to revoke former benefits; the consequence of which would be to re-create benefits, and make a will never intended by the testator. The plaintiff, however, does not ask the relief of the Court on either of these grounds. He admits the jurisdiction of the ecclesiastical court, and that this Court cannot make a will, or give an intention to the testator different from that expressed by his will. He admits, that at the date and execution of the ninth codicil, it was the intention of the testator to revoke the will and previous codicils; and it is because of that intention, and because of the effect of it, and because of the probate of the ninth codicil having been granted, that he comes to this court independently of these grounds, and insists, that a fraud was practised on the testator; and that, in the consideration of a court of equity, a party entitled to a benefit through fraud must be considered a trustee only for those who were deprived of such benefit by such fraud. This Court does not act on the property itself, or on the proceedings of the ecclesiastical court, and does not deal with the intentions or motives, but with the conduct; and compels right to be done by the parties who have fraudulently conducted themselves when they are brought before it. This Court has frequently exercised analogous jurisdiction. Thus, in *Kennell v. Abbott* (1), a legacy given to a person under an assumed character, and which alone was supposed to be the motive of the bounty, was declared to be void. In *Marriot v. Marriot* (2), a person's name had been introduced by fraud, and there this Court exercised jurisdiction. The case of *Barnesly v. Powel* (3) is important, to shew the authority of this Court over parties after the ecclesiastical court has decided upon their rights. In the case of *Kerrich v. Bransby* (4), a will and codicil

(1) 4 Ves. 802.

(2) 1 Stra. 666.

(3) 1 Ves. sen. 119, 286.

(4) 7 Bro. P.C. 437.

which had been obtained by fraud were set aside and cancelled; and there the Court of Chancery came in direct competition with the ecclesiastical court; and it is quite consistent with the decision of the House of Lords on appeal that the case was dismissed on the evidence only, as the fraud appears to have been denied by the answer, and the evidence was conflicting. In *Bulkley v. Wilford* (5), the Court of Chancery carried out the testator's intention, by decreeing that the party intended should have the benefit, and not the heir-at-law, who was the attorney, and should have known the consequences of levying a fine. In *Segrave v. Kirwin* (6), after probate granted, a court of equity examined into the fairness of a residuary devise.

Ex parte Fearon, 5 Ves. 633;

Wallop v. Brown, 4 Bro. C.C. 212;

Gingell v. Horne, 9 Sim. 540;

were also cited; and a passage in *Mitford on Pleadings*, 4th edit. p. 247, was referred to. The demurrer for want of parties must be dismissed, as the plaintiff only seeks by his prayer to have the benefit of the will and eight first codicils; and therefore, Nathaniel Bartlett and the legatees under the ninth codicil are not necessary parties, as the plaintiff disclaims all interest under that codicil.

Mr. Kindersley, in reply.—There is no question, that where a testator has been induced to confer a benefit on a legatee by his will, in consideration of something to be done, this Court will act, and convert that legatee into a trustee; but the case of this plaintiff is, that the testator was fraudulently induced to make the ninth codicil, and consequently, this Court has power, in effect, to upset it. How can this Court say how far the testator was influenced by any representations of any persons?—or that the ninth codicil was obtained through the fraud of Susannah Evans and other defendants, and without which, the testator's intention of bounty would have continued? When the intention of a testator is well ascertained, the Court will act in the furtherance of that intention; but no case has been cited on behalf of the plaintiff to shew, that when a will has been well proved, this

Court will set up an intention at variance with that in such will. *Kennell v. Abbott* was the case of a legacy out of copyhold property, where the testator was imposed upon by the object of his bounty, under a description which he had assumed. In *Marriot v. Marriot*, the court of equity lent its aid in furtherance of the ecclesiastical court. In *Barnesly v. Powel*, this Court exercised jurisdiction; and the question there was, whether or no the probate had been obtained by fraud; but here, the plaintiff raises and litigates that question. And in all the other cases cited, it appears that this Court has frequently assisted the ecclesiastical court in establishing a will which has been duly proved, but has never assumed a jurisdiction in opposition to that court. Nathaniel Bartlett is a necessary party to this suit, as the plaintiff has not repudiated his interest under the ninth codicil.

THE MASTER OF THE ROLLS.—The bill prays for a declaration, that the defendants, the executors, or the defendant Susannah Evans, are or is trustees, or a trustee for the plaintiff, to the extent of such benefit; and the usual accounts. The testator, John Allen, by his will, gave to the plaintiff, and his brother and sister, a legacy of 4,000*l.*, to be divided equally amongst them; and, by the same will, he gave the residue of his estate to his executors, to be held under the same trusts as a sum of 20,000*l.* new 3½ per cent. stock, which was in effect given to trustees for the separate use of the testator's daughter Susannah Evans, for life, with a power to her to dispose thereof by her will, and a limitation to her next-of-kin in default of an appointment. By the 4th codicil, the testator gave to the plaintiff a contingent benefit in the sum of 2,000*l.*, and by the sixth he gave to the plaintiff one-fourth part of the clear residue of the estate. But by the ninth codicil he revoked the benefits given to the plaintiff and some other persons, and directed that they should take no further or other benefit under his will and codicils, except as therein mentioned. And after giving various directions with respect to other persons, he directed his executor, as soon as convenient after his decease, to purchase and invest in the names of Nathaniel Bartlett, Susannah Evans, and William Allen, the sum of 800*l.* 3*l.* per cent. consolidated annuities, for them

(5) 2 Cl. & Fin. 102.

(6) 1 Beat. 57.

to receive the dividends thereof, and to pay the same by equal weekly instalments unto plaintiff, during his life, or until he should attempt to sell, or otherwise dispose of the same; and in such case, he declared, that the same should fall into the residue of his personal estate. Upon a contest in the ecclesiastical court, in which the plaintiff seems to have alleged, that the ninth codicil was obtained by fraud and undue influence, probate of the will and codicils, including the 9th codicil, has been granted to the defendants Richard M'Pherson, Samuel Tomkins, and William Allen. The plaintiff, still alleging that the 9th codicil was obtained by fraud, and by the misrepresentation of Mr. Allen, acting in collusion with, and with the knowledge of Susannah Evans, the residuary legatee, now applies himself to the jurisdiction of the Court, and prays to be relieved here by a declaration of trust, in a case in which he has failed to obtain relief in the ecclesiastical court, by disputing the validity of the codicil. To the bill a demurrer has been put in for want of equity, and for want of parties; and in support of the demurrer, it is argued, that by giving relief, the Court would interfere with the jurisdiction of the ecclesiastical court, which has alone authority to determine upon the validity of a testamentary instrument. The counsel, who support the bill, admit the jurisdiction and authority of the ecclesiastical court in the fullest extent, and that the plaintiff has no right to dispute the legal validity of the probate, or of the nine codicils. The gift given to the plaintiff by the will and preceding codicils, are admitted to be legally revoked, but the effect of the revocation is to confer a greater benefit on the residuary legatee; and if that revocation was as the bill alleges, produced by her by fraud, they allege, that this Court has the jurisdiction to deprive her of the benefit of it, and to declare her to be a trustee for those to whose prejudice the fraud was committed. The case appears to be attended with considerable difficulty, but the Court has already exercised jurisdiction in cases so analogous, that the plaintiff cannot be deprived of the benefit of the will and eight first codicils. It is said by Sir John Leach, in the case of *Segrave v. Kirwin*, that the executor injuring those persons who take by the will, the Court is authorized to engraft an equity on the gift,

and to convert the donee into a trustee for other persons. Thus in *Marriot v. Marriot*, it was held, that notwithstanding probate, a court of equity had authority to inquire, whether the gift of the residuary estate was obtained by fraud. Issues were directed to try the matter by the plaintiff, and certain cases were then mentioned in which the Court declared a trust, although the trust was not expressed in the will itself. Again, in *Kennell v. Abbott*, it is stated, that wherever a legacy is given in a false character, which a person has assumed, and which alone can be supposed to be the intention of bounty, the law will not permit him to avail himself of it, and therefore he cannot demand his legacy. Again, in another case, which was a case in which the executor, who under the probate would have been entitled to the residue, was held not to be so, because he did not inform the testator that the effect of making him executor would be to give him a title to the residue. And in the case of *Barnesly v. Powell*, which was a case of real estate, where the will was revoked by a fine, which fine was levied under the advice of the person who was the heir-at-law, it was held, that the person who was entitled by descent should not be entitled against the proved will which the law revoked, because he had not informed the testator of the effect of the fine to be levied. The case of *Barnesly v. Powell*, (the circumstances of which are so very peculiar, and the frauds in which were of such a singular nature,) does not seem to be applicable to this case; therefore I do not rely on that case, any further than it shews the greatest authority which this Court would exercise on persons, whose rights have been established by former proceedings in the ecclesiastical court. The cases of *Barnesly v. Powell* and *Kennell v. Abbott*, and the case in which the legatee made proposals, which he afterwards neglected to perform, shew, that in the consideration of the Court, the simple fact of the testator appearing by the probate to have given a particular legacy or residue to a person named in his will, is not in itself a reason why the Court should permit a legatee to take the benefit of the gift, if he appears to have obtained it by fraud; and, if fraud be established, this Court has assumed authority to deprive the fraudulent party of the benefit of it.

The present case is not precisely like any former cases. One of the defendants, Susanah Evans, as a residuary legatee, takes her interest, subject of course to the payment of the pecuniary legacies given by the testator, who by his sixth codicil gave to the plaintiff one-fourth of the clear residue of his estate and effects. The payment therefore of their legacies would not be productive of benefit to her. The allegations contained in the bill are very material, and, on the whole, are sufficient to support the bill. Bartlett is a mere trustee for the plaintiff, and has no interest and no duty, except that which the plaintiff is fully competent to sustain; and the other persons interested in the ninth codicil, are not interested in the relief which the plaintiff prays, and which does not relate to the whole codicil, but only to so much of the codicil as, by the revocation therein contained, gives a benefit to the residuary legatee, to the prejudice of the plaintiff; and the demurrer for want of parties cannot be sustained.

WIGRAM, V.C. }
Nov. 14, 15. } ROBERTS v. WILLIAMS.

Voluntary Deed—Delivery—Mortgagee—Costs.

A person executing a voluntary settlement, passes the estate out of himself, though he retain the deed in his own possession; and such settlement is not affected by a subsequent voluntary deed, delivered over to the party in whose favour it is made. The Court, in the absence of special circumstances, will give effect to the first legal instrument in favour of the party claiming under it.

Semble—In a redemption suit, the mortgagee will be ordered to pay the costs occasioned by a defence, in which he fails, not connected with his title as mortgagee.

By indentures of the 7th and 8th of June 1826, between W. Roberts (the settlor) of the first part, Elizabeth R. (the granddaughter of the settlor and the mother of the plaintiff) of the second part, and J. W. and O. J. (releasees to uses) of the third part, W. R. after reciting that he was desirous of making some provision for his grand-daughter E. R. in consideration of natural love and affection, agreed to convey

the premises therein mentioned, and then conveyed the said premises to the use of himself for life, remainder to the use of E. R. in fee. And in the deed he reserved to himself a power to charge the property, by any deed or will, to the extent of 200*l.*, and, for the purpose of securing the same, to create a term of years. E. R. the grand-daughter, died in 1831, in the lifetime of the settlor, leaving the plaintiff her heir-at-law. W. R. the settlor, died in January 1833, having, by his will, dated the 22nd of December 1831, reciting the settlement deed, and the power reserved to him therein, charged the property with 200*l.*, in favour of his son Robert Williams, the defendant in the cause, and appointed the property to him for a term of 500 years. Upon the death of the settlor, Robert Williams entered upon the property as mortgagee for 200*l.* In 1840, the plaintiff filed his bill to redeem the property, upon payment of the 200*l.*, alleging applications to the defendant to assign the term, and a tender of 200*l.* The defendant, by his answer, insisted that this was a voluntary deed, and, never having been out of the possession of the settlor, and never given over to the person in whose favour it was made, nor even communicated to her, was not valid in law: that at the time of its execution, the defendant and the settlor were not upon good terms; but their differences being shortly afterwards made up, the settlor repented of what he had done, and became desirous of defeating the settlement, and for that purpose, in February 1832, executed another deed in favour of the defendant, reciting an agreement for the sale of the property to him for 400*l.*, but the answer did not allege that the consideration was paid. The witnesses on the part of the plaintiff proved the due execution by the settlor of the deed of 1826, and that Elizabeth Roberts was present at the time of the execution, and that the settlor then said to her, that he had given the property to her after his death. The plaintiff had possession of the deed under which he claimed. The defendant did not go into evidence.

Mr. Sutton Sharpe and Mr. Cockerell, for the plaintiff.—By the settlement and the will, the legal estate for 500 years is vested in the defendant, so that the question cannot be tried at law. First, the defendant says, the deed was never out of the possession of

the settlor; he was the proper person to have the custody, as he had a life interest under the deed.

[WIGRAM, V.C.—*Mr. Sanders on Uses*, vol. 1. p. 119, says, the releasee to uses is the proper *custos*.]

The practice is otherwise.

Ford v. Peering, 1 Ves. jun. 72.

Bowles v. Stewart, 1 Sch. & Lef. 209.

Shaw v. Shaw, 12 Price, 163.

2 *Sug. Ven. & Pur.* 8th edit. 194.

4 *Cruise's Dig.* 128.

It is proved that the contents of the deed were communicated to Elizabeth Roberts. But delivery over is not essential to make the deed valid.

Doe v. Knight, 5 B. & C. 471; s. c. 4 Law J. Rep. K.B. 161.

Sear v. Ashwell, 3 Swanst, 411, n. a.

Exton v. Scott, 6 Sim. 31.

Worrall v. Jacob, 3 Mer. 256.

A prior voluntary deed is to be preferred before a subsequent voluntary deed—

Clavering v. Clavering, 2 Vern. 478.

Boughton v. Boughton, 1 Atk. 625.

As to the second deed: the *bona fides* of the sale must be clearly established—*Humphreys v. Pensam* (1). The defendant has not alleged that he paid the consideration: the receipt indorsed on the deed, or any declarations by the settlor, are no evidence of that fact—*Doe v. Webber* (2). Besides, the settlor, by his will, treated the settlement as valid, and exercised the power therein reserved to him.

Mr. Simpson and *Mr. Koe*, for the defendant. — The testator never divested himself of the estate by the first deed, but it remained in his own possession as an escrow; under these circumstances, the settlor executed the subsequent deed, which the settlor handed over to the defendant. Assuming both to be voluntary deeds, the first is not effectual, as not being parted with by the testator; the second was effectually parted with; and that brings it within the principle of two or three cases. In *Naldred v. Gilham* (3), the first deed was retained by the settlor, and the second parted with, and the decision was in favour of the second. The same point was decided in—

(1) 1 Mvl. & Cr. 580.

(2) 1 Ad. & El. 733; s. c. 3 Law J. Rep. (n.s.) K.B. 208.

(3) 1 P. Wms. 577.

Cotton v. King, 2 P. Wms. 357;

Uniacke v. Giles, 2 Mol. 268.

The only difference in the last case was, that the subject-matter was a chose in action.

[WIGRAM, V.C.—A voluntary deed passes nothing in a chose in action.]

The principles applicable to cases of this kind are collected in *Cecil v. Butcher* (4), and the result is, that if there has been an unequivocal delivery of the deed, it is not affected by a subsequent voluntary deed. As to the settlor retaining the deed as tenant for life, it is to be observed, that his interest was not created by that deed; so that it is to be presumed, that he retained it as an imperfect instrument.

Mr. Sutton Sharpe, in reply.—*Naldred v. Gilham* went upon the mistake, the settlor there intending to have had a power of revocation in the settlement. *Antrobus v. Smith* (5), and that class of cases, went upon the fact, that nothing passed at law.

Nov. 15.—WIGRAM, V.C.—This is a case in which the author of a voluntary settlement reserved to himself a power of charging the estate comprised in the settlement with 200*l.*, and of creating a term of years for raising the same. The settlement was made in June 1826. By his will, dated in 1831, he executed the power, and created the term, and charged the estate with 200*l.* in favour of the defendant. Now, supposing the deed of settlement free from all doubt, the plaintiff is owner of the estate, subject to the term. The plaintiff files his bill, praying an account, and to be let in to redeem. The defendant, by his answer, has set up a case which he has not proved in the cause—viz. that the deed remained in the hands of the settlor during his life; as he took a life interest in the property under the deed, that might sufficiently explain his intention in retaining the deed. But the defence set up not being proved, I am perfectly at liberty to exclude that fact from my consideration. But the case was argued as if the retention of the deed by the settlor was proved. Now, I conceive that would be no ground to impeach the deed. First, the plaintiff is not here asking of the Court to take property out of the possession of a party who has executed a deed and not de-

(4) 2 Jac. & Walk. 565.

(5) 12 Ves. 39.

livered it; but the deed is in the possession of the party claiming under it; and the question is, whether the Court is to refuse to give him the benefit of it. Looking at it in the abstract, I will consider whether a person executing a deed does not pass the estate out of himself. Having had occasion to consider this question before, I waited to hear whether that could be the point the defendant was going to take; having considered it as settled, that the deed may remain in the possession of the author, and that in the absence of special circumstances, the Court will give effect to the legal instrument, provided it is not called upon to make that perfect which was not so before—*Sear v. Ashwell*, *Exton v. Scott*, *Clavering v. Clavering*, and *Boughton v. Boughton*. All these cases bear out the proposition, that the deed is good at law, and that a court of equity will give effect to it as a general proposition. Three cases were cited by the defendant's counsel, as countervailing that law or correcting the cases—*Naldred v. Gilham*, *Cotton v. King*, and *Uniacke v. Giles*. The last case, when explained, does not bear upon the point; because, as I understand it, the deed was in fact no deed at all, the property to be acted upon being a chose in action, and nothing passing at law. *Cotton v. King* and *Naldred v. Gilham* stand upon the same footing, forming exceptions to the general rule. *Naldred v. Gilham* is commented upon by Lord Hardwicke, in *Boughton v. Boughton*, and by Mr. Justice Bayley, in *Doe v. Knight*, and by Sir W. Grant in *Worrall v. Jacob*. All these Judges refer the decision to special circumstances—*i. e.* fraud or mistake. I was referred to a passage in *Cecil v. Butcher*, where it was said, that no such facts appear. I cannot assume that the several Judges invented the facts, but I must presume that what they say was founded upon inquiry; and, therefore, that their opinion of that case was, that it could not be supported, unless upon the special circumstances. In this case, it is not suggested that there are any. Indeed, they all go the other way. The author of the settlement had communicated it to the plaintiff's mother, and by his will had exercised the power given by the deed; which would be perfectly absurd if he had considered the deed inoperative. *Exton v. Scott* is a very strong case. The

only other case is *Cecil v. Butcher*. I only observe, that this is the decision of Sir Thomas Plumer, who made those comments upon *Naldred v. Gilham*, that except under special circumstances such a deed is binding in equity. This case is a distinct authority that the deed is good in law; and in equity also, where a party has an equitable interest arising out of such a deed. The only remaining question is as to costs. The defendant, instead of resting his case upon his title, as mortgagee, claims the estate as his own. I own that I think it is too much to say, the mortgagor shall pay the costs of setting right the error into which the defendant has fallen. It seems to me, that the costs ought to go according to the order made in *Harvey v. Tebbutt* (6), in which case I have ascertained that Sir T. Plumer penned the minutes of the order. It must be referred to the Master to take the accounts, and to inquire whether a proper tender was made by the plaintiff; and the costs and further directions must be reserved.

K. BRUCE, V.C. } STORER v. THE GREAT
Dec. 2. } WESTERN RAILWAY.

Sequestration—Practice.—9th New Order of 1841.

The 9th order of 1841, requiring an affidavit, stating that deponent believed a party to be in a county at a particular time, is not satisfied by an affidavit stating that deponent believed that party to be residing in the county at that time.

Mr. Bazalgette moved, upon the 9th New Order of 1841, for a writ of sequestration.—That order stated, that upon the sheriff's return *non est inventus* to an attachment issued against the defendant for not answering the bill, and upon affidavit, stating, among other things, "that the person suing forth such writ verily believed, at the time of suing forth the same, that such defendant was in the county into which such writ was issued," the plaintiff should be entitled to such writ as is mentioned in the order. The affidavit upon which the motion was made stated, that the person suing the writ of attachment verily believed that, at the time

(6) 1 Jac. & Walk. 197.

of suing forth the same, "the defendant *was residing* in the county of Middlesex," into which the writ was issued.

KNIGHT BRUCE, V.C. said, that even according to a correct use of language, a person might be stated to be residing in a county at a particular time, when he was not then actually in that county. The affidavit ought to follow the terms of the order.

Motion refused.

M.R. }
Dec. 2. } EVANS v. WILLIAMS.

21st and 22nd Order of 1841—Practice—Attachment.

A return made by the sheriff, on a writ of attachment, by indorsement, to the effect, that he had seized the defendant under the attachment, is sufficient evidence to induce the Court to give liberty to file the traversing note under the 21st and 22nd orders of the 26th of August 1841.

The defendant was in the custody of the sheriff, under a writ of attachment, for want of answer, and—

Mr. W. M. James now moved, on behalf of the plaintiff, for liberty under the 21st and 22nd orders of the 26th of August 1841, to file a traversing note.

The writ was produced, on the back of which it appeared, by indorsement, that the sheriff had seized the defendant under the attachment, and—

The COURT thereupon made the order sought.

M.R. }
Dec. 2. } RAY v. MARTELL.

Irregularity—Practice—Answer.

Where the name of the infant plaintiff's next friend is mis-spelt in the title to the defendant's answer, the taking of an office copy of the answer is not a waiver of the right to move to take the answer off the file for irregularity.

Mr. Dumerque, on behalf of the plaintiff, on a former day, moved to take the defendant's answer off the file for irregularity.

It appeared, that in the title of the answer, the name of the next friend of the infant plaintiff was spelt *Symmonds*, instead *Simmons*, which was the manner in which the name of the next friend of the plaintiff was spelt in the bill.

Mr. Roll, *contrà*.

The cases cited were—

Griffiths v. Wood, 11 Ves. 62.
Sidgier v. Tyte, *ibid*. 202.
Pieters v. Thompson, Coop. 249.
Cope v. Parry, 1 Madd. 83.

The MASTER OF THE ROLLS, on this day, stated that he had inquired into the practice in this case, and said, that he should make the order sought by the notice of motion, as he did not consider the circumstance of the plaintiff's taking an office copy of the answer amounted to a waiver of the irregularity.

L.C. }
Nov. 22; } PRICE v. NORTH.
Dec. 20. }

Will—Assets—Construction—Charge—Debts.

A general direction, contained in the early part of a will, for the payment of the testator's debts, makes his real estates equitable assets, unless such general direction be controuled or rebutted by a subsequent clause in the will inconsistent with such direction.

Frederick Gwynne commenced his will by directing payment of all his just debts and funeral expenses, and the costs and charges of proving his will, and then gave and devised the reversion and remainder expectant on the death of his father, Thynne Howe Gwynne, in the hereditaments then in his father's possession, situate in the county of Brecon, and all other his hereditaments of or to which he might be seised or entitled in possession, reversion, remainder; or expectancy, to his daughter, A. M. E. Holford, for life, remainder to the heirs male of her body, remainder to the daughters of A. M. E. Holford, as tenants in common in tail, remainder to other persons mentioned in the

will. The testator, in a subsequent part of his will, appointed his father (since deceased) and Joseph Bonner Cheston executors of his will and guardians of his daughter, and, after making a bequest of 50*l.* and other legacies, bequeathed all his ready money, securities for money, goods and chattels whatsoever, (subject to the payment of all his just debts, funeral and testamentary expenses, and the annuities and legacies previously bequeathed by the said will,) to his daughter, A. M. E. Holford, to be paid and transferred to her at twenty-one years of age or day of marriage.

The bill was filed in the Court of Exchequer, by two bond creditors of the testator, on behalf of themselves and all other creditors of the testator, against the parties interested under his will, and against George North, a creditor of the testator, who had obtained letters of administration with the testator's will annexed to be granted to him; and it prayed, that the trusts of the will, so far as the same related to the payment of the testator's debts, might be performed, and that an account might be taken of the debts due to the plaintiff from the said testator, and that an account might be taken of the debts due from him to the other creditors who should come in and contribute to the expenses of the suit, and of the testator's personal estate received by the administrator and the persons named in the will, and claiming to be interested in the testator's estates. The bill then prayed, that such personal estate might be applied in satisfaction of the debts due from the said testator in a due course of administration; and in case the testator's personal estate should not be sufficient for that purpose, then that the real estates might be sold, and the proceeds applied to make up such deficiency.

On the 9th of July 1840 the cause was heard, when a decree was made, by which it was declared, that the debts of the plaintiffs and the will of the testator were well proved; and it was decreed, that the trusts of the testator's will should be carried into execution; and, after directing the usual reference for the taking an account of the testator's personal estate come to the hands of the several defendants, and of the testator's personal estate then outstanding, an

inquiry was directed as to what real estates the testator died seized of, or entitled to in possession or reversion, with the usual directions.

On the 30th of April 1812, in pursuance of the decree of the 9th of July 1810, a report was made, finding the amount of the debts due from the testator at his death, and of the personal estate received by the administrator, and of the balance in his hands, and also the real estates of which the testator died seized in fee simple.

The cause coming on to be heard for further directions on the 4th of May 1812, on the report of the 30th of April 1812, after certain directions for payment into court of the balance of personal estate then gotten in, and also for sale of the testator's real estates, it was referred to the deputy remembrancer, to compute subsequent interest on such of the testator's debts as carried interest; and it was ordered, that the testator's personal estate should be applied in a due course of administration; and in case any part of the personal estate had been applied in payment of the specialty debts, then that the simple contract creditors of the testator should stand in the place of specialty creditors, as far as the amount of the specialty debts should have exhausted the testator's personal estate; and that they should be paid the amount thereof out of the produce of the real estates. And it was further decreed, that the remainder of the testator's real estates should be applied in payment of the several debts reported due, together with the subsequent interest on such of the debts as carried interest; and further directions and costs were reserved.

On the 15th of February 1841, a general report was made, in pursuance of the order of the 4th of May 1812, finding the amount of the testator's specialty and simple contract debts respectively, and such of them as had been, and to what extent, satisfied; and it was found, that there was then standing to the credit of the cause 14,277*l.* 0*s.* 6*d.*, 3*l.* per cent. bank annuities, and 1,074*l.* 7*s.* 4*d.* cash.

On the 26th of February 1841, the Chief Baron (amongst other things) directed the Master's general report to be confirmed, and declared, that the proceeds of the tes-

tator's real estates should be sold to be legal assets of the testator; and after directing payment of the costs of the several parties to be taxed and paid out of the funds standing to the credit of the cause, the Court decreed, that the Master should apportion the residue amongst the specialty creditors of the testator named in the report of the 17th of February 1841, according to the sums reported due to them respectively for principal and interest by that report. The defendant Finch, the administrator *de bonis non* and personal representative of the testator, appealed against the last-mentioned decree, inasmuch as it was inconsistent with the terms of the decrees or orders of the 9th of July 1810 and the 4th of May 1812 respectively, by which the real estate of the testator (as the appellant submitted) was declared and made subject to the payment of the testator's simple contract debts, and which orders were agreeable to the true construction of the testator's will; whereas by the terms of the order of the 26th of February 1841, a large proportion of the money arising from the testator's real estate was directed to be applied in payment of his specialty debts alone, to the prejudice and exclusion of his creditors by simple contract.

The appeal having come on to be heard before the Lord Chancellor, under the provisions of the statute 5 Vict. c. 5,—

Mr. Swanston and *Mr. Coleridge*, for the plaintiffs, contended, that the decision in the Court of Exchequer was correct, inasmuch as the charge for payment of debts in the early part of the will, was controuled by the clause contained in the subsequent part of the will relative to the testator's personal estate: that the due course of distribution of assets was that according to law; and the presumption was, that a testator, when he makes his will, supposes that the natural fund, viz. his personal estate, will suffice for payment of his debts.

Douce v. Lady Torrington, 2 Myl. & K. 600.

Palmer v. Graves, 1 Keen, 545, (1837).

Mr. Girdlestone and *Mr. Neate*, for the defendant Finch, the appellant, contended, first, that the order of the 26th of February 1841 was wrong, inasmuch as it was at variance and inconsistent with the previous

orders made in the suit, which were correct, the bill being filed on behalf of all the creditors of the testator, and praying that the testator's will might be declared well proved, and the trusts thereof, so far as the same related to the testator's debts, carried into execution: that by the prayer of their bill, the plaintiffs at once admitted that certain trusts, as to the real estate, had to be carried into execution, and therefore, that the rule must be followed by making the assets equitable: that the two decrees made by the Court of Exchequer, dated the 4th of May 1812, and the 26th of February 1841, were inconsistent with each other; and that one could not be carried into effect without infringing the other, the former not being a decretal order, to be worked out by further directions, but a decree itself on further directions, made on the Master's report, and pronounced at a time when the rights of the parties were to be declared. Secondly, that if the case were *res integra*, the testator's assets in the present case must be considered equitable: that the true principle was, that if there be a general direction in a will to pay debts, that was an indication to charge the testator's real estates with the payment thereof, unless in a subsequent part of the will there was something to militate against that principle, and limiting the extent of the previous direction—

Clifford v. Lewis, 6 Mad. 33;

Graves v. Graves, 8 Sim. 43, (1836); s.c.

5 Law J. Rep. (N.S.) Chanc. 270:

that in *Douce v. Lady Torrington*, the testator had created a particular fund for the payment of the simple contract debts; and the fair inference, therefore, was, that he did not intend the charge for payment of the debts to extend over all his estates: that in *Palmer v. Graves*, there was both a general and special charge for payment of debts, but the special charge was on leasehold estates only; and in the present case there was a general and a special charge, but the special charge only did what the law would do without it.

Mr. Keene appeared for some of the parties beneficially interested in the testator's estate, which was insolvent.

The LORD CHANCELLOR.—In this case, the introductory words of the will charge

the real estate, by implication, with the payment of debts; but such a charge may be rebutted, if there is anything in the will inconsistent with the debts being charged upon the real estates. In *Thomas v. Britnell* (1), words similar to the present were used in the beginning of the will, but in a subsequent part the general charge was cut down, by the direction of the testator that his real estates should be sold for payment of debts, except particular estates therein mentioned. In *Douce v. Lady Torrington*, there was a charge upon part of the testator's estate for payment of an annuity, and the residue of the testator's estate was directed to be applied to the payment of simple contract debts, which was inconsistent with, and negatived the intention to create a general charge on the part of the testator's debts; and *Palmer v. Graves* was professedly decided upon those two former decisions. What is relied upon in the present case to repel the presumption, is the last clause in the will, respecting the personality; but when the testator gives the same, subject to debts, he does nothing inconsistent with the general intention expressed in his will; and therefore, such a disposition, in such terms, cannot defeat or controul the general charge. My opinion is, that there is a general charge created by the first direction for payment of debts, and that such charge is not defeated by any subsequent clause. In *Godolphin v. Penneck* (2), Lord Hardwicke, speaking of the case of *Leigh v. the Earl of Warwick*, which was carried to the House of Lords, says, "There were words there importing a general charge; and afterwards, some parts of the real estates were devised subject to the payment of debts, and other parts were not so devised; yet Lord King thought that the general charge affected the whole, notwithstanding the particular devise." On looking at that case in *Bro. P.C.*, there are no facts stated. Here, there is a charge for payment of annuities; but these cannot be considered as debts of the testator.

(1) 2 Ves. sen. 313.
(2) *Ibid.* 271.

L.C. }
Nov. 2; } SMITH v. EAST INDIA COMPANY.
Dec. 23. }

Practice.—*Production of Documents*—*East India Company.*

The communications which pass between the East India Company and the Board of Commissioners for India, under 3 & 4 Will. 4. c. 85, are privileged communications, and the company will not be required to produce them for the inspection of a party, who is engaged in litigation with the company respecting matters which are referred to in such communications.

This bill was filed for the purpose of obtaining a decree of the Court, that the East India Company were not entitled to freight on account of certain cotton belonging to the plaintiff.

The defendants set forth in the third schedule to their answer, a list of documents, papers and writings, containing confidential communications made or received by the company or the Court of Directors, or their secretary, on their behalf, to or from her Majesty's Commissioners for the Affairs of India, or their secretary, relative to the plaintiff's claim, and which communications were so made and received respectively, after the plaintiff had advanced his claim, and after the matters in dispute in this suit had arisen.

The Vice Chancellor made an order, directing, among other things, that the plaintiff should be at liberty to inspect the documents, &c. mentioned in the third schedule.

A motion was now made before the Lord Chancellor, on behalf of the defendants, that this part of the Vice Chancellor's order might be discharged.

Mr. L. Wigram and *Mr. Lloyd* appeared for the defendants, and—

Mr. G. Turner and *Mr. Stevens*, for the plaintiff.

The following authorities were referred to:—

Wyatt v. Gore, Holt, N.P.C. 299.
Heslop v. Bank of England, 6 Sim. 192.
Attorney General v. Brown, 1 Swan. 265.
Green v. Weaver, 1 Sim. 404; s. c. 6
Law J. Rep. Chanc. 1.

Greenlaw v. King, 1 Beav. 187; s. c. 8 Law J. Rep. (N.S.) Chanc. 92.

Sawyer v. Birchmore, 1 Keen, 391; s. c. 6 Law J. Rep. (N.S.) Chanc. 277.

Desborough v. Rawlins, 3 Myl. & Cr. 515; s. c. 7 Law J. Rep. (N.S.) Chanc. 171.

Home v. Lord F. Bentinck, 2 Brod. & Bing. 130; and cases in note, 159.

Atherfold v. Beard, 2 Term Rep. 610.

Starkie on Evidence, Vol. 1. p. 71.

Statute 33 Geo. 3. c. 52. s. 6.

— 53 Geo. 3. c. 155. s. 78.

— 3 & 4 Will. 4. c. 85.

Dec. 23.—The LORD CHANCELLOR.—The only question in this case is, whether certain documents, being a correspondence between the Court of Directors of the East India Company and the Commissioners for the Affairs of India, contained in the third schedule to the answer of the defendants in this case, should be produced. It was said that they ought not to be produced, because it was a confidential correspondence; but that is no answer to the production of documents which are referred to in an answer. It was said, that they were official, that it was an official correspondence, and therefore that it was privileged; but an official correspondence, as such, is not privileged, unless under particular and special circumstances and therefore it became necessary to consider the act of the 3 & 4 Will. 4. c. 85. By the act of 3 & 4 Will. 4. c. 85, all the territorial property in the East Indies is transferred from the East India Company to the Crown, to be held by the East India Company in trust, and to be governed and managed for the benefit of the Crown. In addition to this, all the property of the East India Company, all their assets, are transferred to the Crown, to be managed by the East India Company, in trust for the service of the government, that is, in trust for the service of the government of India. They are prohibited from carrying on any commercial transactions, except for the purpose of the government of India. This is the state of the East India Company, in consequence of the act of the 3 & 4 Will. 4. But in all these affairs they are placed under the superintendence, direction, and controul of the Commissioners for the Affairs of India;

and in order that that superintendence and controul should be exercised effectively, and for the benefit of the public, it is necessary that the most unreserved communication should take place between the East India Company and the Board of Controul, and accordingly there are in the act of parliament—particularly, I think, in the 29th section (1), and in other parts of the act—provisions by which the Directors of the East India Company are required to make communications of all their acts and transactions, and correspondence, of every description, to the Board of Controul. Now, it is quite obvious, that public policy requires, and, looking at the act of parliament, it is quite clear that the legislature intended that the most unreserved communication should take place between the Directors of the East India Company and the Board of Controul: that it should be subject to no restraint and no limitations. But it is quite obvious, that if, at the suit of a particular individual, these communications should be subject to be produced in a court of justice, the effect of that would be, to restrain the freedom of the communications, and to render them more cautious, guarded, and reserved. I think, therefore, that these communications come within that class of official communications which are privileged, and that they cannot be communicated, or be subject to be communicated, without infringing the policy of the act of parliament, and without injury to the public interests. I am of opinion, therefore, that the order made on the motion by the Vice Chancellor ought, on these grounds, to be discharged.

(1) The 29th section enacts, "That the said Court of Directors shall from time to time deliver to the said Board, copies of all minutes, orders, resolutions, and proceedings of all Courts of Proprietors general or special, and of all Courts of Directors, within eight days after the holding of such courts respectively, and also copies of all letters, advices, and despatches whatever, which shall at any time or times be received by the said Court of Directors, or any Committee of Directors, and which shall be material to be communicated to the said Board, or which the said Board shall from time to time require."

M.R. }
Dec. 17. } BROOKS v. PURTON.

*Practice.—New Orders—Amendments—
Injunction—Irregularity.*

After answer, a plaintiff obtained an order of course, to amend his bill, but never prosecuted or acted on the same; afterwards the plaintiff obtained an order, as of course, to amend his bill, without prejudice to the injunction issued in the cause, the plaintiff undertaking to amend within a week:—Held, that the order to amend, as of course, without prejudice to the injunction, was irregular.

The answer of the defendant Purton was filed on the 4th of August 1841. On that day the plaintiff obtained an *ex parte* order to amend his bill. On the 24th of November 1841, the plaintiff obtained an order *ex parte* to amend his bill, without prejudice to an injunction issued in the cause, the plaintiff undertaking to amend his bill within a week. The first order was never prosecuted or acted on by the plaintiff.

Mr. Chandless now moved to discharge the order of the 24th of November, for irregularity, and contended, that the plaintiff was not entitled to two orders to amend as of course, and cited the 13th of the Orders of the Court of the 23rd of November 1831, and the 2nd of the Orders of the 9th of May 1839.

Mr. Romilly, *contra*, contended, that the words of the 13th of the Orders of the 23rd of November 1831, ought not to be construed literally, and that the first order to amend, obtained by the plaintiff, never having been acted on, but, on the contrary, abandoned by him, it ought not to be considered as an order within the meaning of the 13th of the Orders of the 23rd of November 1831—*Nicholson v. Peile* (1).

The MASTER OF THE ROLLS said, that the 13th of the Orders of the 23rd of November 1831 was express in terms, and that the order sought to be discharged was clearly in contravention thereof; that there was no authority for the statement that that order was not to be construed literally, or that it

was only applicable to orders obtained to amend that had been acted upon; and that he did not think that the 2nd Order of the 9th of May 1839 was intended as an addition to the 13th of the Orders of the 23rd of November 1831, as contended for on the part of the plaintiff.

Motion granted.

L.C. }
July 15; } BROWN v. THORPE.
Aug. 7. }

*Purchaser—Lien—Equitable Title—
Priority—Shares—Depreciation of Property
in dispute.*

A party who, having a lien or claim on property, suppresses it, and permits another person to purchase the property, upon the supposition that no such lien or claim exists, cannot afterwards be allowed to set up such lien or claim against such purchaser.

When, pending a dispute relative to the right to certain property, it becomes greatly depreciated in value, and a decree giving a party the property would be no compensation for the injury received by him, he is entitled to the option of either recovering the property improperly withheld from him, or the value of it at the time it was first withheld or subtracted.

The bill in this case was filed by the plaintiff, Thomas Brown, against John Thorpe, one of the members of a company called the Northern and Central Bank of England, and one of the persons whose name was registered in pursuance of the requisition of the statute passed in the 7 Geo. 4, entitled, 'An act for the better regulating co-partnerships of certain bankers in England,' &c., and against the assignees of George Strutton. The company had branch banks established at Liverpool, Chester, and Nantwich, but the supreme management of the company's affairs and business was vested in a board of directors, resident at Manchester, where the head bank of the company was established. One of the regulations contained in the company's deed of settlement was, that no transfer should be made of any shares in the company, until notice thereof should have been given to

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(1) 2 Beav. 497.

the Manchester board of directors, and their approval first obtained; and that every such transfer should be made at the house or office of the company at Manchester, and in such manner as the Manchester board of directors should prescribe; and that all debts, liabilities, and engagements due to, or subsisting with the company, or on behalf of every or any proprietor, should at all times, and in all cases, be the first and paramount lien and charge on all the shares and stock of such proprietor. The object of the bill was, to have it declared that the plaintiff was entitled to have fifty shares in the Northern and Central Bank transferred, or the value thereof made good to the plaintiff by the bank. David Hay was the manager of the branch bank at Chester, John Eyton at Nantwich, and Samuel Henry Walsh at Liverpool. On the 5th of April 1836, Edward Carven and William Acton being the registered owners of fifty shares in the Northern and Central Bank, Edward Carven contracted, on behalf of himself and W. Acton, with George Strutton, for the sale thereof, for 762*l.* 10*s.* On the 15th of April 1836, it was agreed between David Hay, George Strutton, and Edward Carven, that the scrip for the fifty shares should be delivered to the manager of the branch bank at Nantwich, on Edward Carven having the amount of the purchase-money placed to the respective credit of Edward Carven and William Acton, with that branch bank, according to their respective interests in the shares; and Edward Carven, at the time, refused to allow the transfers of the shares to be signed, until credit had been given for the purchase-money to Edward Carven and William Acton, by the branch bank at Nantwich, with which bank they kept accounts. David Hay, on that occasion, undertook that Carven and Acton should have credit for the sum of 762*l.* 10*s.* with the Nantwich Bank, on proof of payment by Strutton, of that sum, into the branch bank at Liverpool. George Strutton became a bankrupt on the 5th of May 1836, and his assignees were defendants to the bill. Strutton purchased the shares in question, for the purpose of selling them again at a profit, and at the suggestion of D. Hay, who agreed to lend Strutton the sum required for the payment thereof, in order that Strutton might realize a profit by them, he being, at the time of

the purchase, unprepared from his own resources, for the payment of the shares. On the 16th of April 1836, Strutton informed Hay that he had, on that day, contracted to sell the fifty shares to the plaintiff for 806*l.* 5*s.*, when Hay agreed with Strutton, that he, Hay, should pay the money to Edward Carven, and should receive the transfer papers, and hold them till the shares were resold, and then receive back the amount of such advance with the banking charges, out of the price to be paid on such sale, the advance by Hay being then understood to be of a temporary nature.

On Monday, the 18th of April 1836, Strutton received from Hay a parcel, addressed to Walsh, the manager of the branch bank at Liverpool, which was delivered by Strutton to Walsh in the presence of the plaintiff, when Walsh opened it; and having read a letter which was inclosed therein, stated to Strutton, that he was directed by that letter to receive the amount of fifty shares, which the plaintiff said he was instructed to pay; and the plaintiff then paid to Walsh the sum of 806*l.* 5*s.*, who, on receiving the same, handed the scrip for the fifty shares across the table to Strutton, who, at the same moment, passed it, in the presence of Walsh, to the plaintiff. The plaintiff, at the same interview, requested of Walsh that the fifty shares might be forthwith transferred into the plaintiff's name; to which Walsh replied, that that could not be done at present, on account of the company's books being then closed, for the purpose of making dividends.

On Strutton's return to Chester, Hay, after deducting from the said sum of 806*l.* 5*s.* (the plaintiff's purchase-money for the shares) the sum of 762*l.* 10*s.* advanced to Carven & Acton, on account of the purchase by Strutton of the said shares, and the amount of the banking charges thereon, handed over to Strutton the balance, being 34*l.* 2*s.* 6*d.*, and the transaction relating to the said shares was not entered in Strutton's banking book with the Chester Branch Bank. One of the regulations of the company's deed of settlement was, that a notice in writing must be left with the directors of any intended transfer of shares, and approved of by them, before the deed of transfer could be prepared; and that until the deed of transfer had been executed by both the

transferrer and transferee, and duly registered at the office of the Bank at Manchester, in a book kept for that purpose, the title of the transferee was not complete. Walsh, in his evidence, stated, that after he had received the 80*l.* 5*s.*, and at the interview, on the 18th of April 1836, with the plaintiff and Strutton, he told the plaintiff that a perfect title to the fifty shares could not be made until the transfer of the shares had been duly registered at the head office at Manchester, and which could not then be effected, on account of the company's books being then closed; but this was denied by Strutton in his evidence. On the 19th of April 1836, the plaintiff was informed by one of the officers of the bank, that Strutton would be considered the owner of the shares, as long as they remained in his name. It further appeared in evidence, that it was stated in a letter sent by Hay previously to the 15th of April 1836, to the directors at Manchester, that Strutton had bought fifty shares in the bank from Messrs. Carven & Acton, at a premium of 5*l.* 5*s.* per share, and that Strutton had an offer for the purchase of them at a premium of 6*l.* 5*s.* per share; and by the same letter, Hay requested permission of the directors to be allowed to advance Strutton money, to enable him to pay for the shares, and to enable Strutton to realize a profit of 50*l.* To this request the directors assented, through the agency of the manager of the bank at Manchester. Two of the usual printed forms of notice required to be given by a person wishing to transfer shares, were, on the 14th of April 1836, filled up and signed by Carven & Acton respectively, and forwarded by post, on that day, to the directors at Manchester by Hay, at the request of Strutton, for approval; and on the 19th of April 1836, the transfer of the fifty shares to Strutton was duly registered.

The bank claimed a lien on the shares, in respect of a large debt due to them from Strutton in his account with the bank.

Mr. Richards and *Mr. Mylne*, for the plaintiff.—The case before the Court is an ordinary case of banking transactions, and the bank is responsible for the conduct of its agents, Hay being one of them; and the bank neither directly nor indirectly in-

formed the plaintiff of the lien claimed by it against Strutton on the shares, although they knew that the plaintiff was the purchaser of those shares; on the contrary, the bank became a party to the sale, and agreed, through its agent Hay, that the purchase-money for the shares should be advanced by that person to Strutton as a special favour, on the condition that the same should be repaid out of the purchase-money, to be paid by the plaintiff. The conduct of Hay, though fraudulent, was binding on the bank, whose agent he was, and therefore the claim and lien of the bank ought to be postponed to the plaintiff's claim.

Savage v. Foster, 9 Mod. 35;

Mocatta v. Murgatroyd, 1 P. Wms. 393;

Pickard v. Seers, 6 Ad. & El. 469;

were cited on behalf of the plaintiff.

Mr. James Wigram and *Mr. Bacon*, for the defendant Thorpe.—The plaintiff has neither a moral nor a legal claim against the defendant Thorpe, if we take into consideration the regulations of the bank (which the plaintiff must be presumed to have been well acquainted with), and the fact that the plaintiff was informed, at the time he paid for the shares, that the plaintiff could have no complete title until the transfer of the shares had been approved of and registered by the proper officer of the bank at Manchester, and that the plaintiff would lose the shares if Strutton continued the registered proprietor, and should become bankrupt. Hay did not act as the agent of the bank in the early part of the transaction with Strutton, but only as his friend, and the plaintiff purposely allowed the shares to remain untransferred, and stated to the witness Lyle, on the 19th of April, that rather than incur the expense of a transfer, he would prefer the shares remaining in Strutton's name, although Lyle explained to the plaintiff at the time, that in that case Strutton would be considered by the bank as the proprietor of the shares, notwithstanding the plaintiff might hold a certificate from the bank of Strutton being such proprietor. Moreover, no fraud is anywhere suggested by the bill against the bank, except when the bankruptcy of Strutton occurred.

Mr. Geldart appeared for the assignees of Strutton.

The LORD CHANCELLOR.—There is in this case a most positive contradiction in the evidence of the witnesses upon a fact, as to which it is scarcely possible that any misapprehension should have arisen; but after a careful examination of the evidence, there is, I think, sufficient, upon facts not in dispute, to enable me to decide the question between the parties.

The head office of the Northern and Central Bank was at Manchester, but it had branches at Chester, Nantwich, and Liverpool. Hay was the manager at Chester, Eyton at Nantwich, and Walsh at Liverpool. Carven & Acton were the registered proprietors of fifty shares, which George Strutton had agreed to purchase for 762*l.* 10*s.*, but not having money for that purpose, he applied to Hay for an advance of the requisite amount, when it was agreed that Carven & Acton should execute the assignments, and deposit them with Eyton, they keeping accounts with the Nantwich branch, and that he should undertake to procure them credit for the 762*l.* 10*s.* with that branch, upon receiving the amount, which George Strutton informed Hay he was to receive from the plaintiff Brown, to whom he had agreed to re-sell those shares at a considerable advance. This proposition and arrangement was communicated to, and approved by the office at Manchester, as is proved by the correspondence; and the defendant's witness Lyle, upon his cross-examination, states, that Hay asked permission of the directors to advance the 762*l.* 10*s.* to George Strutton, to enable him to pay Carven & Acton for the fifty shares, to enable him to resell them at a profit, and that the money advanced was to be repaid out of the price to be received by Strutton. Such was the purpose for which Strutton borrowed the 762*l.* 10*s.* of the bank, and they agreed to advance the money, and did advance it for that purpose, and with full knowledge that such was Strutton's object in borrowing it; under such circumstances the bank could not have arrested the shares in Strutton's hands, for the purpose of paying a debt due from him to them, as it was part of their contract with him, that he should be at liberty to resell the shares for the purpose of realizing a profit. If therefore the case stood upon the correspondence and Lyle's evidence alone, a conclu-

sive answer would, I think, be given to the defendant's case. But that is a small part of the defendant's case. Hay having received the assignments executed by Carven & Acton to Strutton, sent them to Walsh, at Liverpool, where Brown was to pay his purchase-money, with directions to deliver them to him upon such payment being made. Strutton's evidence is, that this purchase-money, 807*l.* 10*s.*, was paid by Brown to Walsh, and the assignments delivered by Walsh to Brown, without anything being said as to any lien of the banker upon those shares, for any debt due from Mr. Strutton. This is the point of contradiction between Strutton and Walsh, the latter stating that he told Brown that a perfect title to the shares could not be made to him until the transfers of the shares to him were registered, which could not take place for some time, owing to the books being closed, and that his purchase-money might be in danger if Strutton should become bankrupt or insolvent before that was done. This conversation, he states, took place after the money had been paid, and the papers handed over to Brown. At that time Strutton was not the registered owner of these shares: Carven & Acton's purchase-money had not been paid. The lien of the bank under this deed is against the shares of the proprietors, as to these shares, Strutton was not, and had never been proprietor; but Brown's equitable title to those shares was complete upon his payment of the 807*l.* 10*s.* to the Liverpool branch, by the direction of Strutton, his vendor. In this way also the plaintiff would have a preferable equity over the lien claimed by the bank. But, suppose the bank were, at the time Brown paid his money, entitled to some lien upon those shares, their agent, Walsh, by his own account, permitted Brown to pay his purchase-money, (and indeed he himself received it on account of Strutton,) in full confidence that he, Brown, was to have the shares, without informing him of the lien claimed by the bank, until after the money was paid and the assignments delivered to him, but such payment and delivery completed Brown's title in equity, and what was afterwards said, if true, could not affect it. A party, who having a lien or claim, suppresses it, and permits another to purchase the property, upon the

supposition that no such lien or claim exists, cannot afterwards set it up against such purchaser, but not only did Walsh suppress the supposed lien of the bank, but he was instrumental in creating the title of Brown, which assimilates this case to that of *Draper v. Borlace* (1). This wholesome rule of justice is well illustrated by the case of *Pickard v. Sears*. If then Brown's equitable title to these shares was complete upon payment of his purchase-money on the 18th, at Liverpool, what took place at Manchester on the 19th cannot affect it, for it cannot be pretended, and I presume that Mr. Lyle does not mean, that Brown being aware of his equitable title over any claim of the bank, intended to give effect to such claim, by leaving the assignment at the office on the 19th, whereby alone the registration in the name of Strutton was effected. Of the plaintiff's title against the bank, I entertain no doubt, but in what manner relief is to be afforded to him, is a question of some difficulty. These shares, it appears, have pending this dispute lost much of their value; and a decree giving the plaintiff these fifty shares, would be no compensation for the injury he has received. The contest is between two parties claiming equitable interests in property, which, it appears, was at a particular time appropriated by the party who had no title to it, and in his hands a depreciation has taken place, that party being also in the nature of a trustee, and having the controul over the legal title. I think, under these circumstances, that the plaintiff has an option either to recover the property so improperly withheld from him, or the value of it, at the time it was so subtracted; and as he selects the latter, I think he is entitled to have it declared, that he became upon payment of the 807*l.* 10*s.* to the branch bank, at Liverpool, on the 18th of April, entitled to the fifty shares, and to have the same duly assigned to him and registered, and that the bank is liable to him for the value of such shares on the 18th of April, and to a reference to the Master to inquire what was on that day the value of such fifty shares, and to calculate interest at 4*l.* per cent. upon that sum. The decree must be with costs.

(1) 2 Vern. 370.

WIGRAM, V.C. }
Dec. 13, 14, 16. } MEUX v. BELL.

Equitable Assignment—Second Incumbrancer—Notice—48th New Order.

*A, a feme sole, held a bond of M. & Co., for 8,000*l.* and interest. Upon her marriage with H. J, this bond, with other personal property, was assigned to trustees for the separate use of A, &c., and one of the co-obligors had notice of that settlement. By a separate deed, not referring to the other, the real property of A. was settled upon similar trusts. H. J, having got possession of the bond, treated with B. for a loan of money, and proposed to deposit the bond as a security, representing that it belonged to him jure mariti, and producing the settlement of the realty, which he stated to B. to be the only settlement. B, without previous inquiry of the obligors or the wife, advanced his money upon the acceptance of H. J, and the deposit of the bond, with an undertaking by H. J. to assign the bond when required. The acceptance being dishonoured, a year afterwards B. gave notice to M. & Co. of his claim. The trustees also claiming the bond, M. & Co. filed their bill of interpleader:—Held, that the trustees had the better equity; for that previous notice of the first assignment to one of several co-obligors, who was alive at the date of the second assignment, was sufficient to protect the trustees from the claim of the subsequent incumbrancer with notice to all, and this though the bond were joint and several.*

It is not necessary that the notice should be given for the particular purpose.

The question is one of priority of notice: whether the second incumbrancer made previous inquiries or not is immaterial, if at the time there was no subsisting notice of a prior incumbrance.

Smith v. Smith (1) *may be reconciled with Timson v. Ramsbottom* (2), on the ground that, in the latter case, there was no subsisting notice at the time of the second incumbrancer giving notice.

The 48th New Order merely prohibits the Master from stating affidavits, &c.; it does not prevent him from stating deeds or documents, or from giving his reasons or conclusions, as previously.

(1) 2 Cr. & M. 231; s. c. (as *Smith v. Masterman*) 3 Law J. Rep. (N.S.) Exch. 42.

(2) 2 Keen, 35.

The subject of this suit, which was an interpleader suit, was a bond, dated the 5th of July 1824, by which Sir H. Meux, Thomas Starling Benson, Richard Latham, and Richard Barnett became bound to Miss Jefferies (now Mrs. Jordan) in the penal sum of 16,000*l.*, conditioned to be void on the payment of 8,000*l.* and interest. In 1825, Miss Jefferies intermarried with the defendant Henry Jordan. Previous to the marriage, two settlements were executed; by one of which this bond, with other personal property of the lady, was assigned to Thomas Benson, Starling Benson, R. Jordan the elder, and R. Jordan the younger, upon trust for the wife for life, for her separate use, remainder to the husband for life, remainder to the children of the marriage. By another deed, the real estates of the lady were conveyed to Starling Benson, Thomas Starling Benson (one of the obligors in the bond), R. Jordan the elder, and R. Jordan the younger, upon similar trusts to those declared of the personalty. This last deed did not contain any reference to the settlement of the personalty.

The bond was deposited in the hands of Richard Jordan the elder. In 1832, H. Jordan, the husband, applied to the defendant Bell for the loan of a large sum of money, offering to deposit this bond, of which he had got possession, as a collateral security. To inquiries by Bell, whether the bond were not the subject of settlement, H. Jordan answered that the bond was his, *jure mariti*, and at the same time produced the settlement deed of the real estate, which had no reference to any settlement of the personalty.

On the 24th of July in the same year, after some inquiries as to the personal character of H. Jordan, but without any inquiries of the wife, or of the obligors of the bond, Bell advanced his money, and took as a security H. Jordan's acceptance and a deposit of the bond, with an undertaking by H. Jordan, when called upon, to execute an assignment. On the 7th of March 1833, Henry Jordan's acceptance having been dishonoured, Bell gave notice to the obligors of the deposit of the bond with him as a security for money advanced. The trustees of Mrs. Jordan also claiming the bond, the obligors filed their bill of interpleader. By

an order of the 27th of July 1837, it was referred to the Master to inquire who was or were on the 23rd of July 1832 (the day before the deposit) entitled to the bond in the pleadings mentioned, and how such person or persons became entitled; and under what circumstances the bond came into the possession of Bell. On the 24th of March 1840, the Master made his report, stating the bond, &c. and certifying that he had examined witnesses, and, after reciting the evidence of the witnesses on the part of the *cestuis que trust* and Bell, found that the bond came into the possession of Bell under the circumstances mentioned in the depositions. The evidence of Thomas Starling Benson before the Master was to the effect, that he had informed his partners before the marriage that the bond was to be the subject of settlement; that in 1831, he had ascertained that it was in the possession of R. Jordan the younger, one of the trustees. The evidence of two of the other co-obligors was, that it was always their belief that Thomas Starling Benson was a trustee of the bond, but that they had had no direct notice before 1833. E. Coates, a witness on the part of Bell, deposed, that in June 1832, H. Jordan applied to him to raise money on the bond; that the settlement of the real estate was produced by H. Jordan, and examined by the deponent and Bell, and was represented to them to be the only settlement; and that H. Jordan then produced positive evidence to satisfy them that the interest on the bond was paid to him, H. Jordan, personally; and that H. Jordan then requested that Bell would not require an immediate assignment of the bond, as for certain reasons he did not wish Meux & Co. to be informed, and that in consequence the undertaking to assign was given; that, after some inquiries as to the respectability and property of H. Jordan, the money was advanced, amounting to about 7,000*l.*

The affidavit of Richard Jordan the younger stated, that he was in possession of the bond after the death of Richard Jordan the elder, and that he kept it in a box in his bed-room, and that he believed that H. Jordan fraudulently abstracted it therefrom while on a visit to him, at a time when he was confined to his bed by illness. No exceptions were taken to this report, and the cause now came on for further directions; the questions being,

whether the obligors had sufficient notice of the bond being the subject of settlement before the date of Bell's notice in 1833, and whether Bell could be fixed with notice of that settlement prior to the advance of his money.

Mr. Temple and Mr. Tennant, for Mrs. Jordan and her children.—When the settlement of the real estate was produced to Bell, with the name of T. S. Benson, one of the obligors, appearing thereon as a trustee, it ought to have put him upon inquiry. But he studiously avoided making any inquiries either of the wife or of the obligors. It was not till the acceptance became due and was dishonoured, that he gave any notice to Meux & Co. If he had inquired, he would have learnt of the settlement. The satisfactory evidence of the payment of the interest to H. Jordan consists merely of several unconnected items in the books of Praed & Co. of payments by Meux & Co. to H. Jordan. Bell was dealing with a man in want of money, and he takes from the husband a bond, in which the wife's name appears as obligee, and with notice of a settlement having been executed, which made no mention of the bond. That should have put him on inquiry; for if the bond was to have become the property of the husband, according to the practice of conveyancers, there would have been a recital of such intention; but one of the obligors had notice of the settlement; and notice to one of several trustees, during the life of that trustee, has been held sufficient—*Smith v. Smith* (3).

Mr. Teed and Mr. Messiter, for the trustees of the settlement.

Mr. J. Bacon, for Starling Benson.

[WIGRAM, V.C.—Lord Cottenham always refused to hear the trustees when the *cestuis que trust* were present.]

Mr. Sutton Sharpe and Mr. Ellison, for Bell.—It is impossible to make any decree upon this report. The Master ought to have given his judgment of facts as established by evidence. The question is, which of the two parties has the better equity, for they are both equitable claimants, the legal title being in H. Jordan, the husband. The general rule is, "*qui potior in tempore*," &c., but that right may be controlled by circumstances.

(3) 2 Cr. & M. 231; s. c. (as *Smith v. Masterman*) 3 Law J. Rep. (N.S.) Exch. 42.

In *Foster v. Blackstone* (4), the second incumbrancers first gave notice to the trustees, and were preferred. And that is our case, unless we can be proved to have actual or constructive notice of the settlement. As to priority of notice, the evidence of Thomas Starling Benson only amounts to this, that it was the intention of the parties that the bond should be settled. That is not notice of the actual assignment—*Cothay v. Sydenham* (5). But in *Timson v. Ramsbottom* (6), the Master of the Rolls thought that the knowledge of one of several executors, who was interested, and did not appear to have communicated his knowledge to his co-executors, was not sufficient; and his Lordship observed, upon the case of *Smith v. Smith*, that there might be circumstances to induce the Court to presume that the trustee, who had notice, communicated his knowledge to his co-trustees. Here the only obligor who can be said to have had notice was Thomas Starling Benson, who was interested for his niece Mrs. Jordan. In *Ex parte Watkins* (7), where one of the directors and an actuary knew shares of a company, standing in a bankrupt's name, not to be his, it was held not sufficient to prevent reputed ownership. And it is to be remarked, that this is a joint and several bond. In *Head v. Egerton* (8), the Court refused to take away the title-deeds from the second incumbrancer, S. P.—*Ex parte Cawthorne* (9), *Evans v. Bicknell* (10). The Court therefore cannot decree Bell to deliver up the bond.

Mr. Temple, in reply.—The circumstances disclosed to Bell were sufficient to have put a prudent man on inquiry. If he had inquired, as he was bound to do, he would have learnt the fact of the settlement of the bond. Bell has failed in proving his case. The Court will therefore, on further directions, order him to pay the costs of the plaintiffs, and the other defendants—*Seton on Decrees*, 341.

Dec. 14, 1841.—WIGRAM, V.C.—I cannot but think that this is one of those un-

(4) 1 Myl. & K. 297; s. c. 2 Law J. Rep. (N.S.) Chanc. 84; affirmed on appeal, 9 Bli. 376.

(5) 2 Bro. C.C. 391.

(6) 2 Keen, 35.

(7) 2 Mont. & Ayr. 348.

(8) 3 P. Wms. 280.

(9) 1 Gl. & Jam. 240.

(10) 6 Ves. 173.

fortunate cases, in which the Court is called upon to decide, which of two innocent parties must suffer. Mrs. Jordan and her children are primarily entitled, unless their right can be displaced, to have the money, which is the subject of this suit. When this case was sent to the Master, as to the circumstances, the object of the Court was to have the Master's finding as to the facts, upon which the Court was to act. If the Master reports only that he has examined witnesses, and that the bond came into the possession of the party under the circumstances stated by them, and, instead of finding facts, simply sends the depositions of the witnesses to the Court, it might in many cases seriously embarrass the Court; as it cannot know what it is to assume as proved. Suppose the Master had found that all the partners in the house of Meux & Co. had express notice of the settlement; Bell might have excepted to the Master's report, on the ground, that the Master had found a fact which was not borne out by the evidence; and the case would have been disposed of upon that objection, the Court having the fact of notice, as a ground upon which to deal with the finding. But if the evidence is sent up in this way, the parties have no opportunity of knowing the precise grounds upon which the Court proceeds. The 48th of the New Orders intended to guard against cases of this description. That order has been understood by the Masters to import that they were merely to state what affidavits were used, what state of facts were carried in, &c., and then to give their finding. It was not the intention of Lord Cottenham to do anything of that sort. Before that order, the Masters might state what of the depositions they pleased. Nothing in that order prevents the Master from finding that there was certain evidence, and that from that he draws certain conclusions, or from giving his reasons. Lord Cottenham said, that the Court derived no benefit from the Master stating affidavits, &c.: what the Court wanted was his conclusions, and such a reference to the evidence as that the Court and the parties might judge whether his finding was borne out by it. That order, though it directs the Master not to state depositions, &c., does not prohibit him from stating deeds or documents; and this advisedly, because documents do not generally

remain in the Master's office, whereas depositions, &c. generally do; and the order was framed with great care, to leave the Master at liberty to do everything but state affidavits, &c.; he was merely to state his conclusions from them. I will not dispose of this case at present. Prior to the case of *Wright v. Lord Dorchester* (11), it never was considered that the mere omission of a person having an equitable interest in a fund, of which the legal title was in a third party, to give notice of his incumbrance, would, of itself, give the puisne incumbrancer priority. Mr. Bell, who was counsel in that case, told me that it was a great surprise upon him. I think any one who reads the judgment in *Evans v. Bicknell*, must be satisfied that Lord Eldon's opinion was, that the mere omission to give notice, the transaction being divested of fraud, would not be sufficient for that purpose; and that case Lord Eldon always referred to as a case that he was well satisfied with. In *Cooper v. Fynmore* (12), Sir T. Plumer expressed himself, that the law of the Court was, that the mere omission to give notice would not be sufficient to postpone the first incumbrancer. *Wright v. Lord Dorchester* first raised the question, but did not decide it; for that was an interlocutory application, and though Lord Eldon dissolved the injunction, yet he put the puisne incumbrancer upon terms. Such was the state of the law when *Loveridge v. Cooper* (13) and *Dearle v. Hall* (14) came on. These cases clearly decided, that where a puisne incumbrancer has made inquiries, and been misled, the Court would consider that the first incumbrancer, by omitting to give notice, had occasioned an injury to a third party, and therefore the puisne incumbrancer should be preferred to the first. I have always understood that the law was precisely the same, whether the puisne incumbrancer made inquiries or not, if the first incumbrancer had not given notice; and there is good reason for that; it is treating the question as one of substance, and not of mere form. Whether an incumbrancer makes inquiries, must be immaterial; as if he had, and no previous notice had been given, he would have

(11) 3 Russ. 49, n.

(12) Ibid. 60.

(13) Ibid. 30; s. c. 2 Law J. Rep. Chanc. 75.

(14) Ibid. 1; s. c. 2 Law J. Rep. Chanc. 62.

learnt nothing. The question is, whether at the time of the second incumbrance, there was any notice or not. The only suggestion made in answer to that view is, that if he has not made inquiries, he has not been misled. But there is a fallacy in stating the case so, because, when he gave notice, and was told that there was a prior incumbrance, he would not trust to the security, but would use diligence to get in his money; if, on the other hand, he was told there was no incumbrance, he would then trust to the security, which would have the effect of making him suppose his security good. Therefore, he is injured by placing reliance upon the security, if it turns out that there is a prior incumbrancer. If notice were cotemporaneous with the inquiry, then the inquiry and notice would be the same thing. Suppose notice not given till the money was advanced; the only distinction between the cases is, that of a man who advances money at the time of taking his security, and a man who takes security for an antecedent debt—*Plumb v. Fluitt* (15). Upon that ground, it certainly would appear that it is quite immaterial whether there were inquiries or not, if, at the time notice was given, it appeared that the trustee had no notice of the first incumbrance. But a much safer reason to go upon is that which I conceive to be the principle of a court of equity, namely, that in order to perfect an equitable incumbrance on property, the legal interest of which is in a third person, notice must be given; and that, in the absence of notice, the person claiming to be an incumbrancer has not perfected his title; and, therefore, if another incumbrancer does give notice, that person gets a perfect equitable assignment. Any one who takes the trouble to read *Dearle v. Hall*, must be satisfied that that was the view of Sir T. Plumer: that to perfect the title, you must do that which in equity is tantamount to the delivery of a personal chattel; and at last he uses this expression, "Whenever persons treating for a chose in action do not give notice to the trustee or executor, who is the legal holder of the fund, they do not perfect their title." In *Foster v. Blackstone*, the question was for the first time adjudicated upon, whether the omission of the second incumbrancer to make

inquiries, was to be treated as one of substance or not. The Lord Chancellor in moving the judgment of the House of Lords, stated, in succession, the different principles laid down by Sir T. Plumer, and approved of them. Therefore, the reasoning of Sir T. Plumer, that the first incumbrancer, by omitting to give notice, has not perfected his title, is directly affirmed by the House of Lords; for in that case, the distinction was taken and argued upon, between the cases where there had been previous inquiry, and where not. What I have stated does not conflict with *Smith v. Smith*. The question is, whether the second incumbrancer would have learnt anything from his inquiries. If he would not, his rights will not be affected by the omission to do so. Here, the party, if he had made inquiries, would have ascertained that notice had been given. And the question always is, if the party had inquired, would the facts, as they stood at the time, have disclosed a prior incumbrance? if they would not, according to *Foster v. Blackstone*, the second incumbrancer will have priority. This then is a question of notice; and the next point is, to whom must notice be given? Must it be given to all? If not, then notice to one is sufficient; there is no medium. Upon that ground *Smith v. Smith* was decided, by the full Court of Exchequer. The next point was, as to the nature of the notice. It was said, that notice was not given for the particular purpose; but that point is decided in *Smith v. Smith*, where notice was given in conversation merely, and that was held sufficient. In *Timson v. Ramsbottom*, I should have decided as the Master of the Rolls did, if the case had been before me. Whether the attention of the Master of the Rolls was called to the existing circumstances, does not appear. The question was reduced to this, whether at the time the second incumbrancer took his security, there was any person living who had notice of the first incumbrance. Would the party, if he had inquired, have got any notice? There being no existing notice, Lord Langdale has added the weight of his authority to *Foster v. Blackstone*, that the inquiry was immaterial, if, at the time of the inquiry, there was no notice. This I conceive to be the law. There was no subsisting notice at the time; the notice was good while the trustee lived, but no longer.

(15) 2 Anst. 432.

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This is the conclusion I have come to, after an examination of the cases. If, therefore, upon an examination of the evidence, I find a clear notice given to one of the obligors, I shall feel bound to decide in favour of Mr. Temple's clients. *Head v. Egerton* does not affect my judgment; that case decided that a second incumbrancer shall not have the title deeds he has obtained, taken away from him; but a party may recover upon a bond, without producing it.

Dec. 16.—WIGRAM, V. C.—The question is, whether Mrs. Jordan and her children, or Bell, have the better equity. The only point upon which I reserved my judgment was, whether prior to Bell's notice in 1833, such notice of the marriage settlement had been given to the obligors of the bond, as would deprive Bell of the benefit of the rule of equity which he insists on. In the Master's report, I find the evidence of one of the obligors of the bond, (Thomas Starling Benson,) who deposes, that he had notice at the time of Mrs. Jordan's marriage. I see no reason for questioning his credibility, and his testimony is unimpeached. If in order to arrive at any conclusion it were necessary to fix notice upon the other obligors, the Court would have great difficulty in acting upon the Master's report. But being of opinion, that notice to one of the obligors is all that is requisite, Thomas Starling Benson's testimony is sufficient to decide the case, and I am able to proceed without further inquiry. In *Smith v. Smith*, the very point was decided, and I should feel myself bound by that case, even if I doubted its correctness. But I approve of the principle upon which that case was decided, and the reasoning there made no distinction between a joint and several bond. That case is not impeached by the case of *Timson v. Ramsbottom*. In *Smith v. Smith* it was decided, that notice to one trustee was sufficient while that trustee was living, and the circumstances of the case remained unaltered; and the reason why that is so, is, because otherwise nothing less would be necessary than inquiries of all. The Court did not decide then that, if the trustee to whom alone notice was given, had died before Maberly's bankruptcy, and no other notice was given before the bankruptcy, the property would not have again fallen into the order and disposition

of the bankrupt, nor do I conceive that such a proposition could be sustained; for in the altered state of the case, inquiries of all the existing trustees would not have led the inquirer to a knowledge of the fact. In *Timson v. Ramsbottom*, Lord Langdale did not decide, that if the trustee or executor had been living at the time when the second incumbrance was created, the notice would not have been sufficient; but he decided merely, that there was no sufficient notice at the time when notice of the second incumbrance was given; for the inquiry of the existing trustees would not have led to any knowledge of the first incumbrance. Both cases treat the sufficiency of the notice as a question of substance. In *Smith v. Smith*, the inquiry would have led the person to a knowledge of the incumbrance; in *Timson v. Ramsbottom*, the inquiry would not, and the notice was held insufficient. I entirely concur in both decisions. My judgment must be in favour of Mrs. Jordan and her children. The only question is, by whom the costs are to be borne. If H. Jordan were here, there would be no question upon whom they would be thrown. I cannot throw them upon the fund: that would be to make the wife and children of H. Jordan pay for his default. I cannot give Bell his costs, because, independent of his failing in the suit, he cannot allege that he was originally induced to part with his money upon the result of his inquiries, but upon the faith of the representations by H. Jordan, to which the negligence of the trustee gave a false credit. I cannot acquit the trustee of the settlement of all blame, for on the evidence before me, the bond could never have been in the possession of H. Jordan but for the default of the trustee. Following the case of *Dearle v. Hall*, I shall give no costs as between the co-defendants, and the plaintiffs must have their costs out of the fund. The decree must be, that Bell, as representing H. Jordan, is entitled, in the event of H. Jordan surviving his wife, to a lien on his life interest in the fund, and that, subject to that interest of Bell, the fund must be paid out to the trustees, upon the trusts of the marriage settlement; with a declaration, that the order is made without prejudice to the claim of the trustees to their costs.

WIGRAM, V.C. }
Nov. 22, 23 ; } JONES v. SMITH.
Dec. 2. }

Second Incumbrancer—Notice.

*On the marriage of A. with B, the real estates of A. were settled to the use of A. for life, remainder, subject to an annuity to the wife surviving, to the first and other sons in tail male: with power to A. to charge the property with 2,000*l.* In the deed of settlement, no notice was taken of a previous mortgage on the property secured by a term of years. After the marriage, this term was assigned to C, as a security for the original mortgage money, and a further advance made to A, C. being previously assured by A. and B. that the settlement made on their marriage comprised only B's personal property. Subsequently the term became a security to C. for 4,000*l.*, without any actual notice of the contents of the settlement. After the death of A, the heir in tail filed his bill to redeem on payment of 2,000*l.*, charging that C, at the time of the assignment, had constructive notice of the settlement:—Held, that C. was a mortgagee without notice.*

Notice of "a settlement," purporting not to affect the property in question, is not notice of the actual contents of the settlement.

Cases of constructive notice are to be divided into two classes: first, where the party has actual notice of the fact, that the property in dispute is incumbered in some way, and the Court fixes him with notice of the particular charge; secondly, where the party has dishonestly abstained from inquiry. The rule is not to be extended to an incautious purchaser, where the transaction is bonâ fide.

Mortgagor (tenant for life) and mortgagee join in appointing P. their receiver of the rents, &c., during the life of the mortgagor, for the purpose of paying off a charge upon the life estate, and then of keeping down the interest of a mortgage in fee. After the death of the mortgagor, P. continues to receive and makes payments on account to the mortgagee:—Held, a ground for inquiry before the Master, whether the acts of the mortgagee constituted P. his sole agent, after the determination of the life estate, so as to make him accountable as mortgagee in possession.

By deeds of August 1820 (being the settlement on the marriage of David Jones

*and Sarah Hartley), certain real estates, in the county of Denbigh, were, in consideration of 1,000*l.*, the fortune of Sarah Hartley, which it was agreed should belong absolutely to David Jones after the marriage, conveyed to Thomas Hartley, to the use of David Jones for life, and after his decease, to the intent that Sarah Hartley might receive thereout an annuity of 100*l.* for her life, remainder to the use of the first and other sons of the marriage in tail male. And power was given to David Jones, by deed or will, to charge the said estates with any sum not exceeding 2,000*l.*, for his own use and benefit, and to demise or appoint the same for any term of years, by way of mortgage for securing the said sum and interest; and David Jones thereby covenanted with Thomas Hartley, during his life, to keep down the interest of any sum or sums that might be so charged on the premises; and that the premises thereby conveyed were free from incumbrances created by David Jones, or any of his ancestors, &c.*

David Jones died in February 1836, intestate, leaving the plaintiff J. L. Jones, his eldest son and heir-at-law, and Sarah Jones, his widow (one of the defendants in the suit), who took out letters of administration.

*It appeared that, by an indenture of the 16th of August 1810 (which was not noticed in the settlement of 1820), Thomas Jones, the father of David Jones, demised the said premises to Roger Jones for 500 years, by way of mortgage for securing the sum of 800*l.* and interest; and by divers mesne assignments and further charges, and particularly by an indenture of the 23rd of October 1817, the premises became vested in Samuel Bennett, for the residue of the term of 500 years, for securing the sum of 2,000*l.* and interest; Thomas Jones died in 1819, having by his will devised the premises to David Jones in fee.*

*In 1823, David Jones, being desirous of paying off Bennett's mortgage, and of raising a further sum of 750*l.* for his own use, applied to Thomas Smith (the late husband of Mrs. Smith, the other defendant in the cause), to advance to him the sum of 2,800*l.*, on the security of the term of 500 years.*

By indentures of the 1st of November 1823, between S. Bennett of the first part,

David Jones of the second part, and Thomas Smith of the third part, in consideration of 2,050*l.* paid by T. Smith to S. Bennett, and 750*l.* paid to David Jones, the term of 500 years was assigned to Thomas Smith, by way of mortgage, for securing the sum of 2,800*l.* with interest. And by various indentures of further charge, dated respectively December 1823, January 1824, and February 1824, the said term of 500 years was made a security to the said Thomas Smith, for a sum amounting in the whole to 4,000*l.* and interest. In 1826, David Jones again applied to Thomas Smith to advance him a further sum, upon the security of the said term, which Thomas Smith refused to do, unless David Jones and his wife would levy a fine to him of the said premises. In the course of these negotiations, the settlement of 1820 was produced to Thomas Smith for the first time, whereupon he refused to make any further advances. Shortly afterwards, Thomas Smith applied to D. Jones for further security for the 4,000*l.* then due, and a deed was executed, dated the 26th of September 1829, whereby, after reciting that *Thomas Smith, at the time of his several advances, had no notice of the settlement*, D. Jones, in consideration of the advances, and in exercise of the power reserved to him in the settlement, charged the premises, in favour of Thomas Smith, with 2,000*l.* and interest, and, with the consent of the said Sarah Jones, appointed the same to Thomas Parry, his executors, &c., for the term of 1,000 years, for the better securing the payment of the said sum, with a proviso for redemption, &c.

By a deed of the 28th of September 1829, reciting that 1,200*l.* over and above the said sum of 4,000*l.* was due from the said David Jones to the said Thomas Smith, on an account settled, David Jones demised the same premises to Edward Jones (a trustee) for 100 years, if he, the said David Jones, should so long live, for the better securing to the said Thomas Smith the said sum of 1,200*l.* and interest.

By a deed of the 19th of December 1829, reciting the before-mentioned deeds, and that Thomas Smith, with the consent of David Jones, intended to effect an insurance on the life of David Jones, for 1,500*l.*, David Jones and Thomas Smith, and each of them appointed Thomas Parry their re-

ceiver, to collect the rents, &c. of the said premises; and it was declared, that Thomas Parry should stand possessed of such rents, &c., upon trust, in the first place, to pay certain costs and charges, and then to pay the premium on the said insurance, and in the next place to pay the interest on the two sums of 4,000*l.* and 1,200*l.*, and the surplus in discharge and satisfaction of the principal sum of 1,200*l.*, &c. And it was therein provided, that if Parry should become incapable, &c., D. Jones would concur with T. Smith in appointing another receiver, and that if D. Jones should refuse to concur, it should be lawful for Smith alone to appoint such receiver. And it was further declared, that Thomas Smith, his heirs, executors, &c. should not be accountable for any loss or misapplication of the rents by any such receiver, and that nothing in the said deed should be construed to affect the rights of T. Smith, as mortgagee of the premises. Parry acted as receiver under this deed till October 1837, (which was after the death of D. Jones,) and had fraudulently misappropriated a considerable portion of the rents. In October 1837, Mrs. Smith (as the representative of her late husband, who died in 1834,) entered into possession of the premises. On the death of D. Jones, Mrs. Smith, as such representative, also received the 1,200*l.* in respect of the policy on the life of D. Jones. At the time of filing the bill, the sum of 4,050*l.* was claimed to be due on the mortgage of the said premises. In November 1838, the plaintiff, as tenant in tail under the settlement, filed his bill against Mrs. Smith, to redeem the said premises, and praying that it might be declared that David Jones was not entitled under the settlement to charge the premises with more than 2,000*l.*, including the sums secured by the mortgage of 1810, and the assignment of 1817; and that D. Jones, and T. Smith and Mrs. Smith, as claiming under D. Jones, with notice of the settlement, were bound, during the life of D. Jones, to keep down the interest of that sum; and for an account of what was due to Mrs. Smith at the time of D. Jones's death, upon that footing; and for an account of her receipts or of her agents' (including Parry), or what might have been received by her, except for her wilful default, &c.; and that plaintiff might

be let into possession, upon payment of what was due.

The bill charged, that, previous to the assignment to Thomas Smith, in March 1823, of the term of 500 years, for securing the payment of 2,800*l.*, Smith had notice of the marriage settlement of David and Sarah Jones; and that Mrs. Smith, after the death of David Jones, ought to be considered as a mortgagee in possession of the premises, by Parry, as her agent, and accountable as such.

The answer of Mrs. Smith alleged, that Thomas Smith, previous to the deed of 1823, made inquiries of David Jones and his wife, whether any settlement of the premises comprised in the said term of 500 years had been made on the marriage; and that David Jones and Sarah his wife positively assured Thomas Smith that no such settlement had been made, and that the only settlement made on the occasion, was a settlement of the wife's 1,000*l.*

A letter, of the 31st of October 1826, from Mr. Smith to the plaintiff's solicitor, was put in evidence, in which Smith, after stating his securities, proceeded thus:—"At the time I made the advances, both Jones and his wife solemnly assured me, and offered to make oath, that no settlement was made of his estates on the marriage, but that a settlement was made on her of her own fortune only. I placed confidence in their statement. Previous to the last assizes, they applied again, for a further loan, which I consented to advance, upon having a deed in trust to sell, and a fine levied by Jones and his wife, and I then requested a sight of the settlement, which was at last brought to me, and to my great surprise," &c. "Jones and his wife then solemnly declared, that they never gave instructions for the settlement, and never knew its contents till it was brought to me."

Mrs. Jones, having released her interest under the settlement, was examined by the plaintiff, and deposed that, previous to the deed of 1823, she had an interview with Smith, who asked her how she came to bestow her all upon so needy a person; to which she replied, she had not been so simple as that. He said, "I understand you had a pretty good fortune;" that she replied, "My friends have taken care of me before

my marriage;" that Smith then asked whether there was a settlement, to which she replied, there was, and said it was in the possession of her brother Thomas Hartley.

Mr. Sutton Sharpe and *Mr. Parry*, for the plaintiff.—We contend, that Smith, at the time of the first advance, is fixed with constructive notice of the settlement, and consequently can stand in no better position than D. Jones himself. By that settlement, D. Jones had a power of charging the property with 2,000*l.*, but he covenanted to keep down the interest of that sum during his life, and he also covenanted that the settled estates were free from incumbrances by himself or his ancestors. His claim, therefore on the settled estates could not exceed 2,000*l.*, including the prior charges, with interest, from his death. At the time of Smith's first advance, he was told there was a settlement, and that it was in the possession of the wife's brother, Mr. Hartley. That was sufficient to put him upon inquiry:—

Ferrars v. Cherry, 2 Vern. 384.

Whitbread v. Jordan, 1 You. & Col. 303;

s. c. 4 Law J. Rep. (N.S.) Ex. Eq. 38.

Jackson v. Rowe, 2 Sim. & Stu. 472;

s. c. 4 Law J. Rep. Chanc. 118.

Kennedy v. Green, 3 Myl. & K. 719.

Taylor v. Baker, 5 Price, 306.

Notice of a settlement, as in the case of notice of a lease, must be notice of all its contents—*Hall v. Smith* (1).

[WIGRAM, V.C.—To bring it within *Whitbread v. Jordan*, you must make out that all Welsh squires are in the habit of settling their landed estates upon their marriage.]

Very slight circumstances have been considered as sufficient to put a purchaser upon inquiry—

Coppin v. Fernyhough, 2 Bro. C.C. 291.

Davies v. Thomas, 2 You. & Col. 234;

s. c. 7 Law J. Rep. (N.S.) Ex. Eq. 21.

[WIGRAM, V.C.—No doubt if one deed refers to another, you must search out the title through them all.]

Smith knew there was a settlement; if he had inquired of Hartley, he would have learnt the contents—*Eyre v. Dolphin* (2). After the death of D. Jones, Parry must be considered as the receiver of Mrs. Smith,

(1) 14 Ves. 426.

(2) 2 Ball & Beat. 290.

which will make her accountable as a mortgagee in possession, for Parry was appointed receiver by Smith, who had the legal estate in the term of 500 years.

Mr. Swanston and Mr. Bacon, for *Mrs. Smith*.—The first question is, had Smith any knowledge of the settlement in 1823, or at the time of any subsequent advance? The notice which is attempted to be set up is of a settlement purporting to affect only the wife's property. There is no case in which effect has ever been given to that kind of notice. The case of *Eyre v. Dolphin* is no authority for the plaintiffs; the principle upon which all the cases proceed is, that it must be notice of an interest affecting the property in question. Even that has been qualified in the case of a tenant in possession, under a derivative lease—*Hanbury v. Litchfield* (3). The argument, to be good, must extend to this, that notice of marriage is notice of a settlement. As to the covenant to keep down the interest of the 2,000*l.*, that was a personal obligation on D. Jones, and would not affect a mortgagee under the exercise of the power, nor would the mortgagee be limited to 2,000*l.*, including the incumbrances prior to the date of the settlement.

WIGRAM, V.C.—If the appointee had notice, he would be subject to the same equities as Jones.]

Smith died before D. Jones, consequently the possession of Parry was the possession of D. Jones, and Mrs. Smith is only accountable for what she has actually received; but the deed actually provides that Smith shall not be liable for the neglect or default of Parry.

Mr. Sutton Sharpe, in reply.—Parry's authority as joint receiver terminated with D. Jones's death; as the mortgagee has recognized Parry's acts since that time, Parry must be held the agent of the mortgagee. As to the settlement, the Court will hold the defendant bound by the strict rules of notice, because it is here sought to have money lent to the father, repaid out of the estate of the child. Lord Hardwicke said, whatever is sufficient to put a purchaser on inquiry, is sufficient notice.

Morgan v. Morgan, 1 Atk. 489.

Malpas v. Ackland, 2 Russ. 273.

(3) 2 Myl. & K. 629; s. c. 3 Law J. Rep. (N.S.) Chanc. 49.

A false recital in a deed will not justify a purchaser; he must examine the deed itself—*Biscoe v. Lord Banbury* (4); why then is he not bound to verify the correctness of a verbal statement? A man purchasing of an heir, if he knows that the ancestor left a will, is bound to examine it, though the heir might have told him that it did not relate to the property in question.

Dec. 2, 1841.—WIGRAM, V.C.—Two questions were raised in the argument. The first and most important is, whether Mrs. Smith is entitled, in equity, to the benefit of the term of 500 years, for securing the sum of 2,000*l.*, exceeding the amount which D. Jones was empowered by the settlement to charge. The second, whether Mrs. Smith should be charged as mortgagee in possession, from the death of D. Jones, or only from the time of her actual entry. The first question depends upon the fact of whether Mr. Smith had constructive notice of the settlement; the second, upon the fact of whether Parry was the agent of Mrs. Smith, during the interval to which the second question applies. If Mr. Smith is to be affected with notice, it must be with constructive notice; and the question then resolves itself into this—whether a purchaser, though free from the suspicion of fraud, is to be affected with constructive notice, because he did not use extreme caution. The only evidence of the constructive notice, consists of the letter of the 31st of October 1826, addressed by Mr. Smith to the plaintiff's solicitor, and the evidence of Sarah Jones, who, having released her interest under the settlement, has been examined as a witness. Mr. Smith's letter (which has been made evidence by the plaintiff) contains a statement of a positive denial by D. Jones and his wife, that any part of the husband's lands were comprised in the settlement. The fact of constructive notice is not made clearer by Mrs. Jones's evidence. I would observe, that she was not an unwilling witness, because she released her jointure to make herself a competent witness. She is called to prove that Mr. Smith had notice that the husband's lands were settled. Instead of stating that, the utmost effect of her evidence is, that she told Mr. Smith, at

(4) 1 Chanc. Ca. 287.

their first interview, that there was a settlement of her own fortune; and in the concluding part of her deposition, she says, that after the discovery of the settlement by Smith, she told him that she was very sorry that she did not know that the property was entailed. In the argument at the bar, it was not contended that the evidence carried it higher, but it was said, that notice of "a settlement" was enough to put a prudent man upon inquiry; that if, instead of insisting upon the production of the settlement, Mr. Smith chose to rely upon that statement, he must be bound by the consequences. *Whitbread v. Jordan* was cited, in which case it was laid down, that where a party having knowledge of facts, leading any honest man, using ordinary caution, to make further inquiry, studiously avoids making those inquiries, he must be taken to have notice of those facts; and it was argued, that the conduct of Mr. Smith brought him within the scope of the observations in that case. I do not stop to point out the manifold distinctions peculiar to that case, or the qualifications with which the observations of the Judge require to be received as to the particular passage; nor to advert to the observations that decision has called forth from a high authority, but only to explain the proposition upon which I mean to decide this case, involving, as it does, a principle so important, that I have been led to examine the authorities upon the subject. Consequently, I shall now state the grounds upon which I consider the evidence not sufficient. In doing that, it is not my intention to define in the abstract, what is sufficient notice; and perhaps it would be impossible to decide, *a priori*, what is sufficient constructive notice; because, facts which might not affect one man, would be sufficient to affect another. But I may, with sufficient accuracy, state, that cases of constructive notice may be divided into two classes: first, those cases in which the party charged has had notice that the property in dispute is charged or incumbered in some way, and the Court has fixed him with notice of the particular charge; the second class, those in which the Court is satisfied from evidence that the party to be charged had dishonestly abstained from inquiry. How reluctantly the Court has applied the doctrine to these cases, I will presently observe. The pro-

position of law upon which the former class proceeds, is not that the party charged had notice of a fact, which, in truth, related to the subject in dispute, but actual notice of something that would have led him to the fact. The proposition of law as to the second class, is not that the party charged had abstained from inquiry incautiously, but for fraudulent purposes. This is clearly Sir E. Sugden's opinion—3 *Sugd. Ven. and Pur.* 468, 472. *Ferrars v. Cherry*, which was cited at the bar, illustrates the first proposition. There, the defendant purchased an estate with notice of a post-nuptial settlement, and it was held, that he ought to have inquired whether it was supported by any ante-nuptial agreement, and so the defendant was bound. *Whitbread v. Jordan* I shall notice hereafter. *Jackson v. Rowe* was determined upon a point of pleading. The Vice Chancellor there, after stating the pleadings, added, what is extremely important to the present case, "If the plea, instead of resting on the mere assertion of the intended wife, that she had a good title, had pleaded some interest anterior to the settlement of 1789, by which, the fee simple had vested in her, and had averred that the defendant's father relied upon such prior title, and had no notice of the settlement; then the defence would have prevailed, because reasonable diligence on the part of the defendant's father could not necessarily have led to the discovery of the suppressed settlement." That is exactly the present case. The term of 500 years was antecedent to the settlement, and so a good title was made out by a deed before the settlement. Mr. Smith, at the time he advanced his money, relied upon that term. *Kennedy v. Green* was a case of wilful blindness. In *Taylor v. Baker*, it is unnecessary to go out of the language of the Lord Chief Baron. The party had actual notice that one Strong had a warrant of attorney affecting the estates; but it turned out that Strong had a mortgage: it was held, that the purchaser had notice of an interest affecting the lands in question. *Coppin v. Fernyhough* decided only that a purchaser having actual notice of one instrument referring to others, has constructive notice of all the rest. In *Davies v. Thomas* the marriage settlement recited a conveyance, which conveyance recited a will; and it was held, that the settlement gave

notice of the will. This falls within the principle of the cases constituting the first class. In *Eyre v. Dolphin*, the Court held, that a mortgagee with notice of a settlement, could not protect himself as a purchaser, or be distinguished from the tenant for life, the mortgagor. In *Malpas v. Ackland*, the lessee was held affected with notice of the trusts of a settlement which was recited in his lease. *Biscoe v. Lord Banbury* is strictly within the limits of the rule we are considering. The party purchased with actual notice of a mortgage, which referred to other incumbrances. The language of the Lord Chancellor lays down an important rule, that the purchaser could not be ignorant of the mortgage, and that that would have led him to the other deeds. The cases I have discussed, are all decided. But supposing there were no rules therein referred to, still there is the general rule, that if a person purchases an estate in the occupation of another, he is bound by all the equities of the person occupying—*Allen v. Anthony* (5), *Daniels v. Davison* (6), *Taylor v. Stibbert* (7); for possession is *prima facie* evidence of a seisin in fee. The purchaser there has actual notice of a fact, by which the property may be affected. Again, it was said, that notice of a lease was notice of the covenants in the lease, for it falls within the principle of the constructive notice. This it is not necessary to deny. The last point made was, that a purchaser from an heir-at-law, with notice of a will, would be affected with notice of the contents of the will. To this conclusion, the correctness of which was assumed, I am far from assenting. It is a question which must depend upon circumstances. If the testator had been long dead, and the heir was in possession, and the purchase was made in good faith, a court of equity would not interfere with his legal title. If the death of the testator was recent, other considerations might come in, *e. g.* of fraudulent blindness. But even if I admitted the correctness of the plaintiff's conclusion, I should by no means apply the same reasoning to a marriage settlement. A will purports to be a disposition of the testator's whole property; but there is no presumption in law, that a man makes a

settlement of all his real estate on his marriage. The cases bear out the proposition, that if a man knows that the legal estate is in a third person, he is bound to take notice what the trust is—*Anonymous* (8). Notice that title-deeds are in the possession of a third party, may be notice of an equitable claim upon the estate—*Hiern v. Mill* (9). But it may be said, that it is not sufficient that the cases are consistent with the proposition laid down, but that the principle gives a wider range. Upon this I observe that the reported cases are the only evidence by which the limits of the rule are to be determined. If the cases cited carry it no further, I should be justified in holding the rule and the proposition of the Court co-extensive; but the reported cases confine the rule. *Daniels v. Davison* was always considered an extreme case—3 *Sugd. Ven. and Pur.* 470. In *Miles v. Langley* (10), a person purchased an estate described as "late the residence of J. H.," who had occupied the lands in question; and it was argued, that the purchaser was bound to inquire what the interest of J. H. was. The Master of the Rolls held, that the principle had not application, and that the purchaser was not bound to inquire into the title of J. H. That decision was confirmed by the Lord Chancellor, upon the express ground, that a contrary decision would extend the doctrine. But how? In this way; that in *Daniels v. Davison* the purchaser had notice; in *Miles v. Langley* he had not any notice. Notice of a lease, is notice of the covenants contained in it; but not so in the purchase of a derivative lease—*Hanbury v. Litchfield*. In *Hine v. Dodd* (11), Lord Hardwicke distinguishes between notice and suspicion. *The Attorney General v. Backhouse* (12) was a question upon the validity of a lease of charity lands. Lord Eldon there says, that though the purchaser of a lease has never been considered as a purchaser for valuable consideration, without notice, to the extent of not being bound to know from whom the lessor derived his title, he was not aware of any case that had gone the

(8) *Freem. Chanc. Ca.* 137.

(9) 13 *Ves.* 114.

(10) 1 *Russ. & Myl.* 39; s. c. 2 *Russ. & Myl.* 626.

(11) 2 *Atk.* 275.

(12) 17 *Ves.* 293.

(5) 1 *Mer.* 282.

(6) 17 *Ves.* 433.

(7) 2 *Ves. jun.* 437.

length, that he is to take notice of all those circumstances under which the lessor derived his title. So notice of a tenancy will not, it seems, affect a purchaser with constructive notice of the lessor's title—3 *Sugd. Ven. and Pur.* 473. So a *bond fide* purchaser without notice, cannot be affected by the mere circumstance of the vendor's having been out of possession many years—*Oxwith v. Plummer* (13).

The mere absence of title-deeds will never *per se* affect a purchaser with notice—*Plumb v. Flutt* (14), *Evans v. Bicknell* (15). The next case concludes the question. In *Cothay v. Sydenham* (16), the purchaser had notice of the draft of a deed having been prepared, but not executed; and it was held, that he was not affected with notice of the deed, though executed. "If," said Lord Thurlow, "he had notice of a deed actually executed, he would have been bound; but where notice of intention only, it was otherwise." There is no case or reason to carry it so far as to say, that a purchaser is to be affected by a notice of a deed in contemplation. That case is the more important, because Lord Thurlow was comparing the case of a trustee, but with regard to a purchaser he says, there is no doubt. Sir E. Sugden, who, from his great experience in this branch of the law, I must consider as a high authority, has the following passage—3 *Vendor and Purchaser*, p. 476: "A recital in a deed of a fact, which may or may not, according to circumstances, be held in a court of equity to amount to a fraud, will not, it seems, affect a purchaser for valuable consideration, denying notice of the fraud." In p. 477, "Notice of terms assigned to attend, though equally charged with the trust, is not of itself notice to a purchaser of any incumbrances." The only remaining case is *Whitbread v. Jordan*. I reserved this case to the last, because it was most relied upon at the bar. The plaintiff in that case was a brewer, the defendant Jordan was a publican, and the other defendant, Boulnois, was a wine and spirit merchant. It was proved to be the practice of brewers to lend money to publicans upon a deposit of their deeds.

Jordan had deposited his deeds with the Messrs. Whitbread, and afterwards made a conditional surrender of the premises to the other defendant, by way of mortgage. Mr. Baron Alderson decided, that Boulnois was affected with constructive notice. The question is, whether that decision falls within the limits of this principle. I have always considered that this case might have been brought within the principle of the first proposition; that the evidence of the practice was so strong that it could scarcely be unjust to hold that Jordan must have known that the deposit of the lease was indispensable to a large money credit with a brewer; that then it amounted to actual notice of the fact. But this was not the ground upon which the learned Baron decided it; he did not rest his judgment upon the ground of mere want of caution, to be accounted for by a supposition of a fraudulent purpose; he rested his judgment upon Boulnois having studiously avoided making the obvious inquiries, which common sense would have suggested to an honest man. Sir E. Sugden considers it as a dangerous extension of the doctrines of a court of equity—*Vendor and Purchaser*, vol. 3. p. 471, "The rule of equity, not to relieve against a purchaser having the legal estate, is not confined to a prudent or wary purchaser, but to a *bond fide* one without notice;—both parties have acted without prudence; and each, in the absence of fraud, is at liberty to make the best use he can of his imperfect title." In the course of the discussion I was pressed with the argument, that on the practical application of the rule, to pursue incumbrances, cases must occur in which one incumbrance only was referred to in a recital in a deed; and it was said, that a purchaser, relying upon such a reference, would be subject to any others that might exist; and that this was analogous to the case before the Court; that if a deed recited only one, it was equivalent to saying, there were no others; consequently, a similar statement by parol could not be in a different predicament. I do not admit that the cases are analogous, or that the conclusion is correct. In the application of a strict rule of law, even if the case suggested in argument were analogous, it does not follow of itself that I should be bound to apply the rule. But the cases, in my opinion, are not analogous.

(13) *Bac. Abr. tit. 'Mortgage,' (E); s. c. 2 Vern.* 636.

(14) 2 *Anst.* 432.

(15) 6 *Ves.* 190.

(16) 2 *Bro. C.C.* 391.

In the case suggested at the bar, the purchaser had notice that A. B. had an interest in the estate; therefore it was within the rule. Upon the whole, from an attentive consideration of the reported cases, I am of the same opinion that I entertained at the first, that this cannot be brought within the scope of the cases as to constructive notice. It is incontrovertibly clear, that Smith had no actual notice of a settlement affecting the property. Therefore, if Smith's estate is to be affected by the plaintiff's claim, it must be on the ground of his purposely avoiding inquiry. It is to be observed, that the debt was not an antecedent debt, as in *Whitbread v. Jordan*, but contemporaneous with the mortgage. The evidence of Sarah Jones proves that, and also that a fraud was practised upon him. How then can the want of caution be imputed to him? The only knowledge he had of a settlement was from her, but he had a contemporaneous assertion that that settlement related to other property only. The very statement was calculated to inspire confidence. Why, upon the same principle, would he not be bound to examine every deed in the world of which he had notice, if notice of a settlement, *not* affecting the estate, is to put a purchaser upon inquiry? and how can the counsel for the plaintiff stop short in their principle, that marriage alone is constructive notice of a settlement? For the very basis of their argument rests upon the bare possibility of a settlement. But it was said, that Smith was a solicitor. If I found a solicitor acting under suspicious circumstances, I should be bound to take into account his professional knowledge; but I cannot consider that a solicitor, as one of a class, would wantonly place his money in jeopardy. The affairs of mankind could not be carried on, if the doctrine were extended further. I should rather feel inclined to limit the cases, were not the principle sound in itself, and were it not better to carry out a sound principle rather than to render the law uncertain by confusing the principles of law. It was said, in the argument, that if such transactions were allowed to stand, after the settlor had done all that could be done to secure the estate comprised in the marriage settlement, still there would be no security. I observe, that that is the fault of the law, which permits such estates to exist, and leaves it in the power of the settlor

to deceive others by concealing them. The basis of the whole fraud was the concealment of the charge existing at the time of the marriage. If Smith has acted *bond fide*, equity is bound to meet his legal right, and the conclusion I have come to is, that Smith must be declared to be a mortgagee without notice. The second point for my consideration is, from what time Mrs. Smith is to be considered as in possession of the property as mortgagee. On the death of D. Jones, Parry continued to receive the rents, and handed them over to Mrs. Smith. In order to arrive at a right conclusion, it is necessary to advert to the situation of the parties, and to the deed of the 17th of December 1829. [His Honour here stated the deed.] In that deed there is an express covenant that Smith shall in no way be responsible for any losses. The deed, I observe, makes no provision for the payment of the principal sum of 4,000*l.*, but leaves Smith at full liberty to use all his rights as a mortgagee. Smith dies in 1834, and D. Jones continues Parry as receiver, as he was bound to do, unless the 1,200*l.* and 300*l.* were paid off. D. Jones dies in 1836, and Parry continued receiver of the rents after D. Jones's interest in the estate had determined. Upon the face of that deed I am asked to consider Mrs. Smith as a mortgagee in possession. Upon the construction of the deed alone, I cannot do this. Parry was first the agent of the two; then of D. Jones. It was manifestly the intention of the parties during D. Jones's life estate, to exclude Smith from any liability as mortgagee; but as Mrs. Smith has received the rents since D. Jones's death, whether she thereby constituted Parry her exclusive agent, is a question that may be referred to the Master.

The Court declared, that Mrs. Smith was a mortgagee for 4,000*l.*, and the usual decree was made for redemption, without costs.

WIGRAM, V.C. }
Dec. 9, 11. } PHILLIPS v. GODING.

Amendment—15th Order of 1828—Affidavit.

In support of an application to the Master, under the 15th Order of 1828, the plaintiff's solicitor only made an affidavit, that the proposed amendments were material:—Held, not sufficient to support the order.

The exigency of the order seems to require that the affidavit should state the nature of the proposed amendments.

The plaintiff, after replication, had obtained leave from the Master to amend, under the 15th Order of 1828, on an affidavit by his solicitor alone, "that the proposed amendments had been settled and approved, and signed by counsel, and were not made for delay, &c., but because the same were considered to be material to the case of the plaintiff."

Mr. Heathfield, for the defendant, now moved to discharge the order of the Master, on the ground, amongst other things, that the affidavit, before the Master, did not state the nature of the proposed amendments, so as to enable the Master to judge of their materiality; and he cited *The Attorney General v. the Fishmongers' Company* (1).

Mr. Roupell, contra.—There is nothing to shew that the Master did not exercise his judgment upon the materiality. The terms of the order have been complied with; and the practice of the Masters has been to receive such affidavits, and not to discuss the question of materiality.

WIGRAM, V.C.—This is an application to discharge an order of the Master, made under the 15th Order of 1828, giving the plaintiff leave to amend after replication. That 15th Order provides, &c.—[His Honour here stated the order.]—The jurisdiction of the Court has been transferred to the Master, without, however, altering the requirements of the order. The objections taken are three: first, the insufficient evidence as to the materiality of the amendments; secondly, the insufficient evidence of due diligence; thirdly, the alleged refusal of the Master to give the defendant time to answer the plaintiff's affidavits. With respect to the two first objections, the 15th Order, requiring the Court to be satisfied by affidavits as to the materiality of the amendments, does not specify by whom the affidavit is to be made. The 13th previous Order, relating to amendments before replication, requires the affidavit to be made by the plaintiff and his solicitor. I will not take upon myself to determine, that the application might not be sustained, except under the terms imposed by the

(1) 4 Myl. & Cr. 1.

18th Order; but if the application is made under the 15th, I think it impossible for the Court, upon a reasonable construction of that order alone, to satisfy itself of the materiality of the amendments, unless the witness gives it some better means of ascertaining what they are. This was plainly Lord Cottenham's opinion in *The Attorney General v. the Fishmongers' Company*. I regret the Master's attention was not called to that case. It may deserve the consideration of the plaintiff, from the observations in that case, and from what, on inquiry, I find to be the practice of the Master of the Rolls and the Vice Chancellor of England, to consider whether, under the 15th Order, it is not necessary to specify the nature of the proposed amendments. There is a verbal distinction between the two orders. The 13th only requires the Court to be satisfied by affidavit, that the proposed amendments are "considered" material; under the 15th, the Court is to be satisfied that they "are" material. I never could be satisfied with the oath of the plaintiff's solicitor only, that he thinks them material. If the application should be renewed before the Master, then the two other questions may arise. At present, the order of the Master must be discharged. I think, that the Master ought to have known what was the nature of the proposed amendments.

V.C. }
Dec. 14. } *In re GRANT.*

Master's Report—Practice.—48th Order of August 1841.

The intention of the 48th Order of August 1841, is, not to direct the Master to omit the facts upon which his conclusion is founded, but, as an addition, to refer to those particular portions of evidence from which he deduces his conclusion.

This was a motion to confirm the Master's report, upon the usual reference, under the 1 Will. 4. c. 60, to inquire whether certain persons were trustees within the meaning of the act. The Master had, by his report, found that H. Dallas and Barbara Grant, as co-heiresses at law of Peter Frazer Grant, deceased, the mortgagee of the hereditaments and premises comprised in a certain inden-

ture of mortgage, of the 1st of May 1830, were trustees of the said mortgaged property within the intent and meaning of the act, for the person beneficially entitled to the said mortgage money and interest.

The Master, in his report, had referred to the depositions and state of facts laid before him, but had not set them forth, nor had he set forth the grounds upon which he had come to his conclusion—conceiving that in so doing, he was acting in conformity with the 48th of the Orders of August 1841 (1).

Mr. Toller, in moving to confirm this report, said, that if the plain terms of the order were to guide one in construing it, there could be no other meaning than what the Master had given it, and hoped the Court would not require another reference back to the Master, as the matter was of a very trifling amount.

[*THE VICE CHANCELLOR*.—On this report no person can possibly inform himself what the facts of the case were, or the contents of the affidavits upon which the Master founded his report, or who are the parties beneficially entitled. The Master may very likely be quite right in what he states, but to ascertain whether he is, it would be necessary for me to read through the whole of the deeds and affidavits. The report, as it stands, is mere waste paper, and it never could have been intended that the Court should be bound, upon every report of this sort, to read through all the documents to which the Master refers. Before I make any order, it will be better that I should speak to the Lord Chancellor upon this subject.]

Dec. 14.—*THE VICE CHANCELLOR*.—I have consulted with one of the other Judges upon the subject of the 48th Order, and he tells me, that a petition of the same description has been brought before him, upon the report of another Master, but that Judge was of opinion, that the report was wrong in form, and that the Master had misconceived the 48th Order, as the real object of it was, not to direct the Master to omit the statement of the grounds upon which he came to his conclusion, but to leave that as it was, and to make this an addition; that the Master, when he stated the grounds of his conclusion, should state all

the affidavits, and other evidence from whence he had deduced that conclusion. The order was made for the purpose of preventing disputes upon the Master's report, and knowing on what evidence the Master actually did proceed, and what are the facts to be inferred from it, and the ultimate conclusions. As the matter is of so small an amount, and as it appears the Master has made a mistake in thus forming his report, I will myself read through the papers.

Upon a subsequent day, his Honour said, that he had read through all the papers, and had come to the conclusion, that the Master's report was in substance wrong, and that there was not sufficient evidence before him; but having himself read these papers, (a thing he never intended to do again,) he would not put the parties to the expense of another reference, but would allow what further evidence was necessary, to be produced to the Court. Upon the matter being further explained by *Mr. Toller*, the decree was made.

[See also *Meux v. Bell*, 1 Hare, 91; s. c. *ante*, 77.]

WIGRAM, V.C. }
Dec. 9. } GREGORY v. GREGSON.

Practice.—*Entering Appearance under the 8th Order of 1841.*

The 8th Order of August 1841 is to be read with reference to the 14th succeeding Order, and does not apply to a case where the subpoena was served before the late Orders came into operation.

Mr. Faber moved for leave to enter an appearance for the defendant, under the 8th of the Orders of the 26th of August 1841, the subpoena having been served under the old orders.

Mr. Wood (amicus Curiae) mentioned, that the Vice Chancellor of England considered that the 8th New Order did not apply to such a case, that 8th Order being to be read with reference to the 14th succeeding Order, which altered the form of the memorandum at the foot of the subpoena.

Motion refused.

(1) See 10 Law J. Rep. (N.S.) Chanc. 411.

M.R. }
Dec. 17. } COOMBE v. STEWART.

Prisoner—Clerk in Court—Appearance.

Where a defendant is attached and brought to the bar of the Court for not appearing, a clerk in court ought to be assigned to the defendant for that purpose, on the defendant refusing or neglecting to enter his appearance.

Mr. Pemberton moved, that the defendant might be discharged out of the custody of the warden of the Fleet, under an order of commitment made in this cause, dated the 9th of December 1840, without paying any costs of contempt; that the said order might be set aside for irregularity, and that the plaintiffs might be ordered to pay the defendant his costs of the irregularity; and of the application. It appeared, that the defendant, on the 11th of November 1840, was arrested on a writ of attachment, at the instance of the plaintiffs, and was lodged in prison for not appearing to the bill; that on the 9th of December 1840, he was brought to the bar of this Court by writ of *habeas corpus cum causis*, issued by the plaintiffs, and was committed to the custody of the warden of the Fleet Prison for want of appearance; that no appearance in this cause was entered by or for the defendant at the time of the commitment; that no notice was served on the defendant to enter such appearance, until the month of June 1841, when he was served with a notice to enter such appearance within fourteen days, and that he afterwards entered his appearance.

Mr. Craig, contra.

The MASTER OF THE ROLLS said, that the defendant was entitled to be discharged, under the 11th rule contained in the stat. 1 Will. 4. c. 36; that the proper course to have been taken on the 9th of December 1840, on the defendant being brought to the bar, and having refused or neglected to enter his appearance was, for the Court to have at once assigned to the defendant a clerk in court to enter an appearance for him; that the order, not containing any direction to that effect, was irregular, and must be discharged, with costs.

WIGRAM, V.C. }
Dec. 18, 18. } RENDALL v. RENDALL.

Receiver—Litigation in the Ecclesiastical Court.

For the appointment of a receiver, as a matter of course, pending a suit in the Ecclesiastical Court respecting probate or administration, two things must concur—bonâ fide litigation, and no person legally entitled to collect the assets.

Litigation only, or the fact of no probate, will not, per se, be sufficient; a special case must be made out.

That the same person is named executor in each of the two disputed wills, is no ground for refusing a receiver.

It is not necessary to shew that the property is in danger.

On the 26th of September 1829, Simon Rendall, the testator, made his will, by which he bequeathed a legacy of 150*l.* to George Rendall, and gave the residue of his estate between Simon Rendall, William Rendall, and Hester Sherbourne, in equal shares, and appointed William Rendall and Simon Rendall joint executors. By another alleged will, dated the 3rd of July 1841, the testator, after giving certain legacies (but giving no benefit thereby to George Rendall), gave all the residue of his property to William Rendall absolutely, and appointed William Rendall sole executor.

The testator died on the 4th of July 1841; and on the 10th of July George Rendall entered a *caveat* against the will of July 1841; and, on the 26th of September following, William Rendall instituted a suit in the Ecclesiastical Court, to establish and obtain probate of the will of July 1841: to that suit the present plaintiffs had put in a defensive allegation for the purpose of establishing and obtaining probate of the will of September 1829. The present bill was filed by George and Simon Rendall against William Rendall, and it prayed a receiver of the personal estate of the testator *pendente lite*. A motion was now made for a receiver.

The affidavits, in support of the motion, set forth the state of the proceedings in the Ecclesiastical Court, the nature of the property, consisting of debts (some on mortgage), farming stock, household furniture, &c. The affidavits contra stated that,

according to the usual course of the Court, the litigation would be terminated in Hilary term next.

Mr. Sutton Sharpe and Mr. Follett, for the motion.—The plaintiffs are entitled, as a matter of course, to a receiver, to preserve the property pending the litigation in the Ecclesiastical Court.

Watkins v. Brent, 1 Myl. & Cr. 97; s. c.

5 Law J. Rep. (N.S.) Chanc. 49.

Jones v. Goodrich, 10 Sim. 327; s. c.

9 Law J. Rep. (N.S.) Chanc. 120.

Wood v. Hitchings, 2 Beav. 289; s. c.

10 Law J. Rep. (N.S.) Chanc. 257.

Mr. Temple and Mr. Blunt, contra.—In *Wood v. Hitchings*, the fact of the existence of “a” will was in dispute, therefore the circumstances of that case made it necessary for the Court to interfere. But an executor may act without probate, for his title is derived from the will, and not from the probate—*Wills v. Rich* (1). The defendant is named executor under both wills, and will administer the estate, whichever of the wills is set up. In *Watkins v. Brent*, a receiver was appointed, upon the express ground that W. B. Brent had recognized the proceedings. In *Marr v. Littlewood* (2), the Lord Chancellor says, “In *Watkins v. Brent*, I expressed an opinion, that a plaintiff, who had instituted proceedings in the Ecclesiastical Court for the purpose of challenging a will, and who sought to deprive his adversary of the title to administer the assets, could not put forward that circumstance as of itself furnishing a ground for the interference of the Court.” There is nothing in this case to shew that there is any likelihood of danger to the estate, and if the latter will is set up the whole expense of the receiver will fall on the defendant.

Henshaw v. Atkinson, 2 Ves. & B. 85.

Ball v. Oliver, 2 Ibid. 96.

Mr. S. Sharpe, in reply.—In *Marr v. Littlewood*, the receiver was granted on the application of the actual executor, the probate granted having become inoperative by reason of the conduct of the party impeaching the will. A suit to recall probate, as in *Watkins v. Brent*, may not be sufficient ground for a receiver, but a suit to prevent a person obtaining probate certainly is—

(1) 2 Atk. 285.

(2) 2 Myl. & Cr. 458.

Day v. Croft (3). In *Wood v. Hitchings*, Lord Langdale intimated, that there was no case in which the Court had refused a receiver, where there was no legal personal representative. It is not necessary to prove danger to the property.

WIGRAM, V.C.—I will not decide this case without looking into those two cases before Lord Cottenham. I agree, that the institution of a suit may not, *per se*, be a reason for the appointment of a receiver. But a litigation, where it is apparent that there must be delay before there is any person legally entitled to get in the assets, is *prima facie* ground for a receiver. The Court cannot speculate upon danger to the property, where it is of that nature to require protection of this kind.

Dec. 18.—WIGRAM, V.C.—A litigation is going on, to determine who shall be executor, and till that is decided, there is no executor. As to the nature of the property, it consists of debts on mortgage, farming stock, household furniture, &c. There is, therefore, property to be protected; and a litigation going on, which, it is said, will be probably terminated in Hilary term next. But it may continue much longer, and there would be abundant time for mischief, if a stranger were disposed to do it. Therefore, this is not within the case of *Jones v. Frost*, where a receiver was refused, though there was no representative, because, there being no litigation, there was no *constat* that a representative might not have been immediately obtained; I think that decision was right, because the moment the testator died, anybody might throw costs on the estate, merely by filing a bill, and alleging that there was no representation. When the present case was opened, I assumed that where a *bond fide* litigation was going on, and some time must elapse before a decision could be had, that it was a matter of course to appoint a receiver. The cause stood over, because it was said, that Lord Cottenham, in two cases, had impugned that doctrine—viz. in *Watkins v. Brent* and *Marr v. Littlewood*. If so, I should have hesitated, though that hesitation would have belied my own opinion. Two rules may be stated with safety: first, where a probate has been granted, a receiver will not be appointed pending liti-

(3) 2 Beav. 293, n.

gation, unless some special case is made out; secondly, where no probate is granted, it is of course to appoint a receiver pending litigation, unless a special case can be made out to the contrary. I need not in this case cite authorities to prove the former proposition; but the defendant says, that where executors are named in the will, the Court will not interfere against them without a special case, and that this is founded on the principle, that executors derive their title under the will, and not under the probate; and *Wille v. Rich*, before Lord Hardwicke, was referred to. I will not stop to observe upon the fallacy of that argument, for the question is not, what an executor may do *de jure*, but what this Court will do, in case of a dispute who is executor. The latter of these two propositions alone calls for observation. Lord Redesdale, *Plead. in Equity*, p. 136, states, that the general rule is, to appoint a receiver for the mere preservation of the property pending litigation, though the Ecclesiastical Court itself may provide for the collection of the effects; and this is stated without qualification. In *King v. King* (4), opposite claims had been set up under different wills, and a decision had been made that one will was not sufficiently proved; it was objected, that the property was not in danger; Lord Eldon said, "This is almost a motion of course: the Court goes upon this, that it will do its best to collect the effects." I will go at once to a late case, *Wood v. Huchings*, in which the same principle was acted upon. I pass over the intermediate cases with this observation, that I believe the proposition of Lord Eldon, in *King v. King*, is unimpeached by a single decree. Special reasons have been assigned in some cases, as in *Jones v. Frost* (5), for not doing it; but those very exceptions affirm the general proposition.

Has then Lord Cottenham impeached the rule in the two cases referred to? In *Watkins v. Brent*, he supported the Vice Chancellor's order, upon the express ground, that Brent, by agreeing with his opponents, that the validity of the will should be tried in the existing suit, had thereby treated himself as not being complete executor; and he added, "I consider that a sufficient case for the Vice Chancellor's appointing a re-

ceiver, that Brent has recognized such a proceeding." In *Marr v. Littlewood*, the same Judge appointed a receiver on the application of the actual executor, on the ground, that the opposing party, by having given notice to the debtors not to pay the plaintiff, had destroyed the effect of the probate; and his Lordship added, "The doctrine laid down in *Jones v. Frost*, does not interfere with the ground of my decision. In that case, it did not sufficiently appear that there was a litigation pending in the Ecclesiastical Court, whereas here, unquestionably, such a litigation is depending." The decisions in these cases are direct authorities for the latter of the two propositions, for Lord Cottenham reduced each case to the same two predicaments—no executors with power to act, and a *bond fide* litigation. The only question then is, whether Lord Cottenham said anything in *Watkins v. Brent*, opposed to what he decided. In that case there were two executors, Margaret Brent and W. B. Brent. Probate was granted to Margaret, who died, but the Lords Commissioners were pressed with the argument, that the will was duly authenticated by the probate, and that the probate granted to Margaret enured to the other executor, W. B. Brent. And *Brookes v. Stroud* (6) was cited. In *Watkins v. Brent*, it will be observed, that W. B. Brent had been treated in the Ecclesiastical Court as executor, for, in the original suit against her, he became defendant after her death, in her stead. But however that may be, it is clear that Lord Cottenham argued the case upon the footing of W. B. Brent being executor by force of the probate to Margaret. And after referring to cases where the Court had refused to interfere against a person in whose favour a decision had been made by the Ecclesiastical Court, he concludes with a statement, that W. B. Brent had treated himself as not complete executor,—a statement which was untrue, in the sense of his not being named executor in the will; and true only in the sense of his being executor with a litigated title. I cannot better conclude my remarks than in the language of Lord Cottenham (7): "There is no doubt, that by the rule of this Court, if the representation is in contest, and no person has

(4) 6 Ves. 172.

(5) 3 Mad. 1.

(6) 1 Salk. 3.

(7) 1 Myl. & Cr. 102.

been constituted executor, the Court interferes, not because of the contest, but because there is no proper person to receive the assets."

M.R. }
Dec. 18, 21. } JAMES v. JAMES.

Practice.—Parties—Amendment—Replication.

A cause having come on for hearing, the same was directed to stand over, and leave was given to amend by adding interested parties. The bill was amended, and stated that the plaintiffs represented those parties, by having become their legal personal representatives, and, the amendments having been answered, a replication was filed. The Court declined ordering the replication to be taken off the file, save on condition that the defendants waived any objection they might have to the form of the pleadings on the cause coming on again to be heard.

The bill sought, that the will of a testator might be established, and the interest of all parties thereunder ascertained, and that a purchase by a trustee, whose personal representative was a party defendant, might be set aside. The defendants put in their answer, insisting that the personal representatives of three different persons ought to be parties to the suit in respect of certain accruing shares of the testator's estate and effects, coming to them by the deaths of some brothers and sisters.

A replication having been filed, and witnesses examined, the cause came on for hearing, and was in June 1840, on the argument of the objection taken by the answer, directed by the Court to stand over, "with liberty for the plaintiffs to amend, by adding proper parties, with apt words to charge them." The bill was amended by the plaintiffs stating the circumstance of their having obtained letters of administration to the goods, &c. of the three interested parties; and the defendants by their answer submitted, that the amendments made were irregular, and craved the full benefit of the objection, in the same manner as if they had pleaded the same. The plaintiffs having filed a replication to the defendants' answer, a motion was now made that the same might be taken off the file.

Mr. Pemberton and Mr. Freeling, for the motion, contended, that the plaintiffs ought to have filed a supplemental bill, instead of amending the original bill; that after a cause was at issue, and witnesses have been examined, it was not competent for issue again to be joined between the same parties in the same cause, and witnesses to be again examined; that where new parties were added after publication passed, the cause as to such parties could be heard on bill and answer only; that although the defendants might have a valid defence against the plaintiffs, as the bill was originally framed, they might fail in their defence to the bill as amended; and that the plaintiffs ought to have obtained an order to add new plaintiffs; and they cited—

Milligan v. Mitchell, 1 Myl. & Cr. 433;
s. c. 7 Law J. Rep. (N.S.) Chanc. 37.
Harrison's Chanc. Prac. 61.

Mr. Turner and Mr. W. M. James, contra, contended, that the application should have been to take the amended bill off the file; that the amendment was admitted by the motion to be regular; that a right to file a replication was as of course, when new parties were placed on the record; and that the defendants by their answers to the amended bill had tendered a new issue.

The MASTER OF THE ROLLS observed, that there appeared to be some difficulty in maintaining the propriety of the amendments; and that his opinion at present was, that the defendants were not entitled to have the replication taken off the file, but only to have the benefit of the objection taken by them to the amendments reserved to the hearing; but that if the defendants were inclined to cede their objection on the point of form, his Lordship would relieve them from the replication.

The case was ultimately arranged between the parties; and an order was made by consent, that the replication should be taken off the file, the defendants undertaking to waive the objection to the record on the matter of form at the hearing; the plaintiffs being at liberty to reply *de novo* to the answer of another party, who had been made a defendant by the order of June 1840, which gave the plaintiffs liberty to amend.

WIGRAM, V.C. }
Dec. 8. } HAWKINS v. DODD.

Practice.—Payment out of Court.

The Court will not order payment out of court to the solicitor of a legatee, of any sum exceeding 10l.

Mr. F. J. Hall applied for payment out of court of a legacy of 11l., to the solicitor of a legatee, admitting that it had been the rule of the Court not to make the order where the sum exceeded 10l. (1); but as the excess was so small in this case, he thought it might be done, to save expense.

WIGRAM, V.C., refused to extend the rule.

WIGRAM, V.C. }
Dec. 9. } OTTEY v. PENSAM.

Practice.—15th New Order—Substituted Service.

To substitute service of an order requiring personal service, it is necessary first to apply for leave to serve notice of the motion on the clerk in court, and then to come for substitution of service of the order.

The 15th New Order does not take away the old practice.

Mr. Wells moved on behalf of the plaintiff's solicitor, that the plaintiff might be ordered to pay him the amount of his bill of costs, as found due upon a taxation pursuant to an order of the Vice Chancellor of England in January last; and that service of such order upon her clerk in court might be considered good service. The proceedings were taken under the old practice; and it was submitted, that the 15th of the Orders of August 1841 left it optional to the party to proceed in either way.

WIGRAM, V.C.—That order does not take away the old practice; but you should first have got an order for service of notice of this motion upon the clerk in court. The order you ask for requires personal service; but if you can satisfy the Court that you cannot make personal service, the Court will

allow you to substitute service on the clerk in court. You must, first, however, get an order to substitute service of this notice of motion, and then apply to substitute service of the order upon the clerk in court.

WIGRAM, V.C. {
Dec. 9. { CHRISTIAN v. CHAMBERS.
CHRISTIAN v. FIELD.

Production of Documents—Solicitor's Lien.

The solicitor of the executrix in a creditors' suit had paid off a lien upon deeds, and the executrix, in passing her accounts, which were prepared by her solicitor, had claimed and been allowed this sum as paid by herself:—Held, that this must be considered as a payment to the executrix to the use of the solicitor, and that the production of the deeds could not be resisted by him on the ground of lien.

This was a creditors' suit against Ann Chambers, as executrix of Thomas Chambers. In the Master's office, certain documents were called for, which the executrix stated to be in the possession of Field, her solicitor, who claimed a lien upon them. A supplemental bill was then filed against Field, for the delivery up of the documents in question. Field, by his answer, admitted the possession, but claimed to hold them as a security for 8l. 8s. It appeared, that they were previously in the possession of Bentley, a certificated conveyancer, who claimed a lien upon them for 8l. 8s. This sum Field, by the request of the executrix, paid off, and Bentley delivered the deeds over to Field, the executrix giving a receipt for them. Mrs. Chambers, in her charge and discharge, taken in before the Master, and which Field admitted to have been prepared by himself, had claimed the sum as paid by her for the benefit of the estate, and had been allowed it in passing her accounts.

Mr. Sutton Sharpe now moved for the production of the documents, on the ground that the defendants, by their conduct, had made the sum for which the lien was claimed, a debt due from the executrix personally to Field.

Mr. Walker, contra.

WIGRAM, V.C.—The executrix has carried in her accounts, stating that this sum

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(1) *Bradling v. Humble*, Jac. 48.

was paid by her. The Master never allows any sum in the account, except it has been actually paid; but she has got the allowance as if it were paid. Field, as her solicitor, prepared that account. I think I ought, therefore, to treat Field as having authorized the executrix to receive this sum to his use. The documents, therefore, must be produced.

WIGRAM, V.C. }
Dec. 3, 4, 10. } SCOTSON v. GAURY.

Practice.—Extending Common Injunction, Affidavit in support—Delay—Hearing Exceptions instantier.

Where a motion is made on the eve of trial to extend the common injunction for want of answer, and the answer is filed the day before the motion is made, it is not the practice of the Court to look into the answer and decide as to its sufficiency.

Semble—The Court would pursue that course if the answer were palpably evasive.

Exceptions are taken to the answer, and it is reported insufficient; the Court, where there has been delay on the part of the plaintiff, will, for the purposes of the motion, treat the case as if exceptions had been taken to the Master's report, and look at the answer instantier, to see if it is "substantially" insufficient.

The affidavit in support of the motion must be made by the plaintiff himself, unless a sufficient excuse be given. The affidavit of the plaintiff's solicitor stated, that his client left London for Ireland, on the 23rd of November, (the motion being made on the 3rd of December,) without stating that he was obliged to go:—Held, no sufficient excuse, as the plaintiff before his departure had an opportunity of making the requisite affidavit.

The action was brought on the 11th of August, and a bill for an injunction filed on the 8th of November; held, that the delay was sufficient ground for refusing the motion on the eve of the trial, as the plaintiff must have known the cause of action.

On the 11th of August 1841, the defendant in equity commenced an action against Scotson, on a bill of exchange. The declaration was delivered on the 28th of October, and the trial was expected to come on on the 6th of December. On the 8th of No-

vember, Scotson filed his bill against Gaury, and stated that, being in embarrassed circumstances, he called his creditors together, and proposed a composition; that all the creditors agreed to accept the composition upon the terms proposed, and executed the deed, except Gaury, who refused to sign the deed except upon the terms of having certain goods returned, and of Scotson giving him two bills of exchange for 200*l.* and 150*l.*, over and above the bills given for the composition money rateably with the other creditors;—that the plaintiff was at length prevailed upon by Gaury to give him the said two bills, which were paid when they became due;—that the first of the bills for the composition money became due on the 9th of August last, and was the subject of the pending action. The bill then charged that the composition deed was void, on the ground of fraud, and prayed a discovery, and an injunction to restrain the action at law. To this bill an appearance was entered on the 9th of November; on the 24th, the plaintiff obtained the common injunction, and on the 29th served the defendant with notice for December 2nd, to extend the injunction to stay trial. On the 1st of December, the defendant filed his answer. In support of this motion, the solicitor of the plaintiff made an affidavit, that on the 23rd of November the plaintiff left London for Ireland, on the business of his employers, and was not likely to return for ten or fourteen days; that the deponent had inquired into the circumstances connected with the bills of exchange, and that he believed that the answer of the defendant would afford evidence material to the defence at law, and that the plaintiff could not safely proceed to trial without it.

Mr. Randall, for the motion.—The rule is, that an answer filed the day before the motion made, is a sufficient answer; but in a case like the present, where the trial is fixed for so early a day, and the defendant has delayed putting in his answer till the latest moment, the Court, to prevent the injustice of the plaintiff being deprived of the benefit of the discovery, will itself look at the answer to see if it is sufficient. That course was pursued in *Munnings v. Adamson* (1), and the principle was recognized by the

(1) 1 Sim. 510.

present Master of the Rolls, in *Thompson v. Byrom* (2).

[WIGRAM, V.C.—If the defendant was merely to say, 'I am not bound to answer,' it might be so; but if he gives anything like an answer, there would be great difficulty.]

The Court would look whether there was a substantial answer. In *Raphael v. Birdwood* (3), an analogous case, Lord Eldon said, he would follow the practice of Lord Hardwicke, and himself examine the bill and answer.

WIGRAM, V.C.—My impression is, that the case of *Munnings v. Adamson* has never been followed. I have inquired of the most experienced registrars, and cannot learn that such a practice exists. I have also referred to the cases of

Whitehouse v. Hickman, 1 Sim. & Stu.

104; s. c. 2 Law J. Rep. Chanc. 59;

Bruce v. Webb, 2 Mer. 474;

Ibbotson v. Booth, 1 Sim. & Stu. 103;

s. c. 1 Law J. Rep. Chanc. 83;

Bishton v. Birch, 1 Ves. & Bea. 366;

in every one of which there was the same subject of complaint, but in none of them did the Court order the record to be handed up. In *Thompson v. Byrom*, the Master of the Rolls had no occasion to consider this point; and his words import no more than that such a thing had once been done. My objection to the application is this: if the exceptions are taken, the defendant may put in a further answer, dissolve the injunction, and proceed immediately to trial; but if the Court takes up the record, and says, the answer is insufficient, the defendant is deprived of the means of making the record perfect. The plaintiff may refuse to file exceptions, and so the defendant is left at the plaintiff's mercy. In the case of a clearly fraudulent answer, I might feel inclined to follow the case of *Munnings v. Adamson*. The only remaining question is, whether there is sufficient evidence before me to satisfy me that the defendant has improperly delayed putting in his answer. From the dates of the several proceedings, it is impossible to say, that there has been any un-

(2) 2 Beav. 15; s. c. 8 Law J. Rep. (N.S.) Chanc. 159.

(3) 1 Swanst. 228.

avoidable delay on the part of the defendant.

Dec. 4.—*Mr. Randall* mentioned the case again, when His Honour said, that if the plaintiff upon looking into the answer should be advised to take exceptions, he would hear the exceptions *instantly*.

The trial did not come on so early as was expected, the cause being made a special jury cause. On the 4th of December, the order was obtained referring the answer for insufficiency. On the 8th, the Master made his report allowing the exceptions; and on the 10th, the motion to extend the injunction was renewed.

Mr. Randall, for the motion.

Mr. Wood, contra.—The plaintiff is not entitled to the order he asks, on two grounds, first, because the affidavit in support was not made by the plaintiff himself, but by his solicitor only, and no sufficient reason was assigned why it was not—*Spalding v. Keely* (4). Secondly, because the application is made on the eve of trial, and the plaintiff has been guilty of delay—

Thorpe v. Hughes, 3 Myl. & Cr. 742;

s. c. 7 Law J. Rep. (N.S.) Chanc. 246.

Field v. Beaumont, 1 Swanst. 204.

The delay in obtaining the common injunction is fatal to this application.

WIGRAM, V.C.—If the plaintiff delays his application, I would go out of the usual course, and look at the answer and the Master's report, as if exceptions had been taken to the report. The facility with which the Court grants injunctions is such, that the Court must look at the practice in strictness. If a plaintiff files his bill, it is almost impossible for the defendant to get in his answer within the time limited. At the expiration of that time, the common injunction is granted, and then the plaintiff is at liberty to move to extend the common injunction. This motion is made upon affidavit. If the plaintiff has been guilty of delay, nothing could be more unjust than that the defendant should be prevented from proceeding to trial by reason of that delay. The Court, therefore, has laid down rules

(4) 7 Sim. 377; s. c. 4 Law J. Rep. (N.S.) Chanc. 109.

for the protection of the parties, and one rule is to require an affidavit from the plaintiff in a given form. Now, the form of the affidavit requires him to swear that he expects discovery material to his defence at law. The plaintiff, a party himself, is little likely to form a just opinion as to the materiality of that discovery; yet he is the person in all cases from whom the affidavit is required, unless a good reason can be assigned for his not doing it: and a good reason was suggested why the affidavit was required from him; for no man who respects the sanctity of an oath would swear that he expected to obtain material discovery, if he knew that he had no defence to the action. But the solicitor of the party might very well swear to his belief, because he knows nothing of the circumstances of the case but what he learns from his client. The rule of the Court being as I have stated, the plaintiff in this case has not made the affidavit, and I have to consider whether there is a sufficient excuse for his not having done so. The excuse given is, that the plaintiff left London on the 23rd of December. Without taking into account any delay on filing the bill, there was from the 17th to the 23rd, an interval of time during the whole of which the party might have made this affidavit. Without any suggestion that he was *obliged* to go, I am asked to receive the affidavit of his solicitor, and treat it as a compliance with the rule. I think that, in this case, the affidavit ought not to be received; for I am bound to consider all the opportunities the party has had; and the sufficiency of the affidavit is to be affected by the degree of diligence. Delays are imputed in two respects; first, before the bill was filed, and next after it was filed. By the statement in the bill it appears that there was an arrangement respecting the first two bills. On the 9th of August the third bill became due, and on the 11th the action was brought; and the bill was not filed until the 8th of November. That interval is not accounted for, except by a suggestion, that the party might not have known the cause of action. After the statement in his bill, as to the arrangement of the first two bills, and the bringing of the action upon the third, I am asked to intend in the plaintiff's favour, that he did not know the cause of action, when he has not told me so

by the affidavit. In this respect, the affidavit is defective, in not accounting for the delay. Secondly, after the bill filed: the plaintiff was in a condition to apply for the common injunction on the 17th of November, and as soon as he had obtained that, he might have applied to extend it to stay trial. With this possibility that his opponent might be delayed, he allows the whole time to elapse during which he was in London, and then seeks to deprive the plaintiff at law of the opportunity of trying his cause. Coupling this with the other facts of the case, I think I shall not strain the rule of the Court, in holding that the application is too late. As to the third point, the answer being reported insufficient: when an application of a similar kind was made to Sir A. Hart, he went the length of asking for the pleadings in the cause; and, taking them out of court, he looked into the answer to see if it was sufficient; for, he said, when the rule of the Court went to deprive a party of his opportunity of trying his cause at law, he would treat the case as one of substance. When that case was cited on a former day, I endeavoured to ascertain whether the practice had been ever followed, and I was not surprised that it had not; because, if the Court decides that the answer is insufficient, the consequence is, that the party has no means of rectifying the record. It has never been followed in practice, and there is only a mere dictum of Lord Langdale, which means nothing more than that the thing has been done. I suggested upon a former occasion, that if the plaintiff filed exceptions, the Court would hear them at once. The Court will now treat this as a question of substance, when the trial is to come on the next day, and will satisfy itself whether there is any ground on the merits for the injunction. His Honour having looked into the pleadings, said, that the answer, though technically insufficient, gave all the information the plaintiff required; that if the Court found the defendant taking advantage of the circumstances, to give an evasive answer, it might set off one act of misconduct against the other; but that not being so, the application must be refused, on the ground of the plaintiff's delay, after he must be taken to have known the cause of action.

M.R. } ROBERTSON v. EASTERN COUN-
Dec. 17, 18. } TIES RAILWAY COMPANY.

Injunction—Practice—Costs.

After the common injunction has issued to stay execution in an action at law, the Court will not grant a special injunction to stay the prosecution of the proceedings in such action.

Where the motion, which is for an injunction, which is refused, and also for inspection of papers, the latter not being objected to at the bar, the Court will give the defendant the costs of the motion.

Mr. G. Turner and Mr. Romilly were proceeding to move for a special injunction, to restrain the defendants from prosecuting proceedings at law against the plaintiff, when it was objected, that an order for the common injunction, staying execution, but not trial, had some time back issued on the application of the plaintiff against the defendants in the cause.

The motion having been ordered to stand over, to enable the plaintiff's counsel to produce an authority for the application,—

Mr. G. Turner, on the 18th of December, stated to the Court, that no authority on the subject could be found, but that as the notice of motion also sought the production of papers, admitted by the defendant to be in his possession, and the Court had ordered the papers to be produced, although the defendants by their answer submitted to the Court, whether they ought to be produced, and admitted that they persisted in not allowing the plaintiff an inspection of the papers, the costs of the motion ought to be costs in the cause.

Mr. Pemberton and Mr. Grove, contra.—

The MASTER OF THE ROLLS stated, that the notice of motion for the injunction rendered it requisite for the opposite party to go through the whole of the proceedings in the cause, wherein expenses were incurred, which would have been most probably avoided, if the application had been simply for production of papers, in favour of the production whereof the defendants' counsel might very probably have previously advised his clients.

END OF MICHAELMAS TERM, 1841.

CASES ARGUED AND DETERMINED

IN THE

Court of Chancery.

HILARY TERM, 5 VICTORIÆ.

K. BRUCE, V.C. { LADE v. TRILL.
Jan. 11, 12. { TRILL v. LADE.

Parol Agreement—Statute of Limitations—Account.

A parol agreement was entered into between the respective executors of L. and T, that various old accounts of their testators should be settled on a certain fixed day, without reference to the time that they had been running. The accounts were settled accordingly, and the executors of L. received the value of a promissory note, that would have been barred by the Statute. The executors of T. afterwards discovered a note from L. to T, on which nothing had been done for more than six years before the death of T:—Held, that the executors of T. were entitled to have the benefit of this note.

The bill in the first suit, was a common creditors' bill, filed by the executors of Thomas Lade, against the executors of John Trill, in respect of two promissory notes, dated in 1830 and 1831, and given by John Trill to Thomas Lade.

A cross bill was filed by the executors of Trill against the executors of Lade, setting up the following case:—Trill was a bricklayer, and Lade a farmer; they were related, lived near each other, had various dealings together, and frequently accommodated each other with money, for which promissory notes were given. Both Trill and Lade

died in 1835. Some time in 1837 a verbal agreement was entered into between the respective executors, to the effect, that they should meet together, that the various accounts previous to 1830, about which time Trill had retired from business, should be produced and gone into, without reference to the length of time that they had been running, and that a balance should be struck. The parties accordingly met, and various papers were produced, among which was a promissory note from Trill to Lade for 200*l.*, the last payment on which bore date in 1810, and which would have been barred by the statute. The accounts were gone into and settled, and among other sums, the sum of 200*l.*, and interest from 1810, were allowed to Lade's executors. It appeared that a balance was due from Trill's estate of 25*l.*, which was forthwith paid. In 1838, the executors of Trill discovered among the papers of their testator a promissory note for 250*l.*, dated in 1811, and given by Lade to Trill, which would have been barred by the statute, and they insisted that the sum secured by this note and interest, should be allowed to them, and set off against the sum due to the plaintiffs.

Mr. Cooper and Mr. Hislop Clarke, for the plaintiffs in the creditors' bill, insisted, that the settlement of 1837 was a final settlement of all the old accounts, and could not be re-opened, and relied on the Statute

of Limitations, which had been set up by the answer.

Mr. Simpson and *Mr. Lewis*, for the defendants to the creditors' bill, and plaintiffs in the cross bill.

Mr. Hingston, for parties interested in the real estate.

KNIGHT BRUCE, V.C.—I think this is an agreement, for valuable consideration, on both sides, to waive the benefit of the statute, and that it ought to be enforced. This note may have been discharged, and may be productive of no advantage to the defendants, but it gives a case for inquiry. The accounts must be taken in both suits. Let it be referred to the Master to take an account of all transactions between Trill and Lade, the Master not to disturb any account that he shall find to be settled before or after the decease of Trill, and particularly the account of 1837; either party to be allowed to surcharge or falsify; and neither party to be at liberty to take advantage of the Statute of Limitations.

V.C.
Dec. 23, 1841. }
L.C. } WALKER v. FLETCHER.
Jan. 27, 28, 1842. }

Filing Affidavits—3 Geo. 3. c. 159.

An affidavit, in support of a bill, filed under the act 3 Geo. 3. c. 159, and directed by the act to be annexed to the bill, may, according to the practice which has always existed, be sworn previously to the filing of the bill.

The bill in this case was filed on the 25th day of June 1841, under the act 53 Geo. 3. c. 159, intituled, 'An Act to limit the responsibility of ship-owners in certain cases.' The plaintiffs were the owners of a ship, called the *Hunter*, which, upon a voyage from London to Sunderland, with a cargo of goods of the value of 2,000*l.*, came into collision with another vessel, called the *Robert*, belonging to the defendants, by which collision both vessels were sunk, and everything on board lost. An action at law was brought by the defendants against the plaintiffs, for the loss of their ship, the *Robert*, and by

the plaintiffs against the defendants, for the loss of their ship, the *Hunter*. A verdict in both actions was, by consent, entered for the plaintiff, for the sum of 500*l.* The present bill was then filed by the plaintiffs, under the 7th section of the above act (1), praying an account of the value of both the ships, and the losses sustained by the accident, and also praying an injunction to restrain the defendants from proceeding in the action at law. To this bill an affidavit was annexed, as directed by the same section of the act, which was sworn at Sunderland, on the 2nd of June 1841, four days before the filing of the bill. The injunction was granted *ex parte*.

Mr. Richards, for the defendant, now moved that the injunction might be dissolved, and raised this objection, that the affidavit annexed to the bill, having been sworn four days before the bill was filed, it could not be considered an affidavit within the meaning of the statute. The statute

(1) "And be it further enacted, that if several persons shall suffer any loss or damage in or to their goods, wares, merchandises, ships, or otherwise, by any means for which the responsibility of any owner or owners is limited by this act as aforesaid, and the value of the ship or vessel, with all her appurtenances, and the amount of the freight, estimated as herein is mentioned, shall not be sufficient to make full compensation to all and every the person and persons suffering such loss and damages, it shall and may be lawful to and for the person or persons liable to make satisfaction for such loss or damage, or any one or more of them, on behalf of himself, herself, or themselves, and the other owner or owners of the same ship or vessel, to exhibit a bill in any court of equity, having competent jurisdiction, against all the persons who shall have brought any such action or actions, suit or suits as aforesaid, and all other persons who shall claim to be entitled to any recompense for any loss or damage arising or happening by the same separate and distinct accident, act, neglect, or default, or on the same occasion, to ascertain the amount of the value of the ship or vessel, appurtenances, and freight, and for payment or distribution thereof rateably among the several persons claiming recompense as aforesaid, in proportion to the amount of the several losses or damages sustained by such persons so claiming such recompense as aforesaid, according to the rules of equity, and as the case may require: Provided always, that the plaintiff or plaintiffs in such bill shall annex to such bill an affidavit that he, she, or they do not directly or indirectly collude with any of the defendants thereto, or with any other owner or owners of the same ship or vessel, or with any other person or persons, but that such bill is filed for the purposes only of justice, and to obtain the benefit of the provisions of this act," &c.

intended, that the sanction of an oath should be added by the plaintiff at the time of filing his bill : and could this affidavit be considered to have been sworn in the cause when the cause did not actually exist ? If the act contemplated a bill with an affidavit annexed, the bill then would not be good without the affidavit, and that affidavit must necessarily be filed in the suit after its existence had commenced by the bill being put on the file.

Mr. Bethell and *Mr. Bacon*, on the same side.

Mr. Stewart and *Mr. Simpson*, contra.

The VICE CHANCELLOR.—With respect to the objection upon the statute, I have ascertained, upon inquiry, that ever since this statute was passed, which is twenty-eight years ago, the same practice had been adopted with respect to the filing of bills and affidavits annexed, under the statute, as was, I believe, adopted with respect to bills of interpleader and bills to change the jurisdiction in the case of lost deeds for more than a century before, that is to say, that the six clerks uniformly filed the bills, with affidavits sworn, before the bills were filed ; and in the case of *Lens v. Michell* (2), in the course of last year, an application was made in the case of a bill of interpleader, “to detach from the bill the affidavit which had been attached to the bill.” Those are the words in the notice of motion, the fact appearing that the bill was filed on the 19th of February, and the affidavit, which the course of the court required, filed on the 18th of February ; and the order made was this :—“This Court doth not think fit to make any order on the said motion, but doth order, that the said defendant, John Michell, do pay to the plaintiff the costs of this application, to be taxed by the Master of the court in rotation, in case the parties differ about the same.” It was found, upon inquiry, that this practice had always subsisted, and, as the six clerks say, it is evident to common sense that that must be the practice. This was the answer I had from the six clerks’ office yesterday. Notwithstanding all the hypothetical objections that may be made to its being filed, as, for instance, that such an affidavit would

support an indictment for perjury, in case its averments were false, still the necessity of the case requires that the affidavit should be sworn before the bill is filed. Now I do not sit here to enter into a question whether a practice that has prevailed in the court for so many years, and which has been only followed in the case of this act of 53 Geo. 3, is right or wrong ; I must take the uniform practice that has subsisted for a long while, to be the right practice, unless it is altered by some new order of the Court. With respect to the particular language of this statute, it is to be observed, that this act was passed at a time when my Lord Eldon was Lord Chancellor, who must have been pretty well aware of the course of this court ; and if he had thought it necessary that it should be part of the provision of the legislature, in framing the act, that the affidavit should be sworn after the bill was filed, am I to suppose that that learned Lord would have allowed the act of parliament to have passed the House of Lords in the form it now is ? I cannot but suppose that such an act of parliament as this, which did so much vary the right of the subject, must have been discussed. It is impossible it could have been passed without much discussion, because it is altogether a new principle, and a principle with which the counsel for the defendant is not satisfied, for he talks of the hardship of the case. That may be speculative ; but be it so, the greater the hardship of the enactment, the greater the probability is that the enactment must have been much discussed. Then, if the attention of mankind, or that portion of mankind which composes the legislature, is called to it, and they devise a certain mode of proceeding, I must take it for granted, that when they have not enacted otherwise, they do mean such an affidavit as would be required, according to the course of the court, in cases where bills are to be filed with an affidavit annexed.

Then, with regard to the particular words of the statute, it is superfluous almost to enter into them, because, though it does seem in the first instance that the language is “persons,” and that the persons who own the ship which comes in collision, and does the mischief, are to “have leave to exhibit the bill,” and it is directed that the plaintiff or plaintiffs to such bill shall annex an affi-

(2) Reg. lib. B. 1839, fol. 433.

davit, it certainly struck me as remarkable that there should be the third provision—"And the plaintiff or plaintiffs in such bill shall, on filing such bill, apply to the Court," evidently implying it was an immediate consecutive act on the filing of the bill, that there should be an application to the Court, which would not be the case if there were between the filing of the bill and the application to the Court the swearing and filing of the affidavit or the annexing it to the bill. The truth is, these affidavits are not filed anywhere; they are annexed to the bill when the bill is filed. My opinion is, knowing what the practice has been, and seeing what was done in the case of *Lens v. Mitchell*, that I am not at liberty to say what has been done in this case is wrong. The fact is, that this affidavit was sworn at Sunderland on the 21st of June, and that the bill was filed on the 25th; but I cannot admit, that the interval of four days, considering the distance of the place, is of itself a material space of time. Knowing what has been done in actually decided cases, with reference to what is called *uno flatu*—that things which have taken three or four days to be executed, have, for the purpose of common sense and justice, been held to have been done *uno flatu*,—I shall hold the filing of the affidavit on the 21st of June, and annexing it to the bill on the 25th, quite a sufficient compliance with the practice of the court.

This decision of the Vice Chancellor was appealed from, and argued before the Lord Chancellor on the 27th and 28th of January 1842.

The LORD CHANCELLOR affirmed the order of the Vice Chancellor.

K. BRUCE, V.C. }
Jan. 12. } WILKINS v. BUCKNELL.

Practice.—Case for Court of Law.

A court of equity will not send a case for the opinion of a court of law, upon demurrer.

This was a suit to enforce the specific performance of an agreement for a lease. The defendant demurred, on the ground that the instrument in question was a lease, and that the plaintiff's remedy was at law. Upon the

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suggestion that a case should be sent for the opinion of a court of law,—

KNIGHT BRUCE, V.C., said, that Lord Cottenham had expressed an opinion that a case could not be sent to law upon demurrer, and that he should act upon that opinion. If, however, both parties would consent, he would send a case. Both parties having consented, a case was sent accordingly.

K. BRUCE, V.C. }
Jan. 13, 14. } COPPIN v. GRAY.

Statute of Limitations—Bill in Equity—Baron and Feme—Separate Estate—Bill of Exchange.

The Statute of Limitations is prevented from running by the filing of a bill in equity.

Whether the Statute of Limitations applies to demands on the separate estate of a married woman—quære.

The right of action of a party accepting an accommodation bill, and paying it before it becomes payable, dates, not from the time of actual payment, but the time that it becomes payable.

A. filed a bill against B, six years, wanting three days, from the time that his right of suit, in respect of a debt, accrued, and sued out subpoena, but did not serve it. Two years after filing the bill, he again sued out subpoena, and served it. B. pleaded the Statute of Limitations generally:—Held, that the claim of A. was not barred by the statute.

This was a suit for the purpose of obtaining payment, out of the separate estate of a married woman, of a debt incurred by her to the plaintiff's testator, and evidenced by a bill of exchange drawn by her, when covert, upon him.

The bill of exchange was a three months' bill, dated the 12th of November 1827, and therefore became payable on the 15th of February 1828. It appeared by the evidence, as read from the brief, that the bill was paid by the plaintiff's testator on the 15th of January 1828, which the counsel for the plaintiff suggested was an error, and ought to have been the 15th of February. The bill in this suit was filed on the 12th of February 1834, six years, wanting three

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days, after the day that the bill became payable, and subpoena was sued out, but not served. Subpoena was not again sued out and served until August 1836.

The answer of the defendant did not notice the circumstance of the subpoena not having been served until upwards of two years after the bill had been filed, or seek any special relief on that account; but merely set up the Statute of Limitations generally as a bar to the relief sought by the bill.

Mr. Swanston and *Mr. Beavan*, for the plaintiffs.

Mr. C. P. Cooper and *Mr. Kenyon Parker*, for the defendants, argued, first, that the plaintiffs were barred, as more than six years had elapsed between the incurring of the debt, and the filing of the bill; and, secondly, that supposing the bill had not been paid until the 15th of February, the plaintiffs would still be barred, on the ground, that the mere filing a bill in equity would not prevent the statute from running. They stated, that at common law the issuing a writ, which was not returned, was no bar to the Statute of Limitations before the Uniformity of Process Act, and that by that act (2 Will. 4. c. 39. s. 10,) it was enacted, "that no first writ should be available to prevent the operation of any statute, unless the defendant should be arrested thereon, or served therewith, or proceedings to or towards outlawry should be had thereupon, or unless such writ should be returned *non est inventus*, and entered of record within a month after the expiration thereof." They argued that a court of equity would adapt statutory provisions relating to common law proceedings, to proceedings answering to them in courts of equity by analogy—*Wheat v. Graham* (1), and that the issuing of a writ of subpoena answered to the original writ at law. They insisted on the hardship to which parties would be exposed, if debts could be kept alive against them without their knowledge for any length of time; and that not merely the institution of proceedings, but notice of them to the defendants, properly constituted the bar to the statute. They also cited *Lacon v. Lacon* (2), *Sterndale v. Hankinson* (3).

(1) 7 Sim. 61.

(2) 2 Atk. 395.

(3) 1 Sim. 393.

In the course of the argument, his Honour observed, that even under the section of the Uniformity of Process Act, a debt could be kept alive against a defendant, without notice to him, or his knowledge of it; and that it was a constant practice to return a writ *non est inventus*, without serving or attempting to serve the defendant.—See *Archbold's Practice*, 7th edit. vol. 2. p. 922.

KNIGHT BRUCE, V.C.—I think that for the purpose of the Statute of Limitations, the bill of exchange must be considered as paid when it arrived at a state of complete maturity, and that the defendants cannot set up the fact of the bill having been prepaid for the purpose of defeating the claims of the plaintiff. The only defence to the payment of the amount claimed by the plaintiff, rests on the Statute of Limitations; that the filing a bill in equity is no bar to the statute, and that the bar begins from the serving of the subpoena. It is true, that a *lis pendens* begins only from the time of such service—the question is, whether this doctrine extends to the Statute of Limitations. On my request to be furnished with authorities in support of the proposition contended for by the defendants, I have been informed that none can be found, and my own recollection does not suggest any. The position is not supported by any of the forms of pleading, by the language of Judges, or by writers of text-books. The time of filing the bill is invariably referred to. I cannot see that the proposition contended for is based in principle. There is no analogy to be derived from the practice of the courts of common law, either before or after the Uniformity of Process Act. If this rule is to be introduced into courts of equity, it must be introduced by higher authority than mine. It has been argued, that great inconvenience would arise to a party by holding that a bill filed, and nothing done upon it, might keep a debt alive without notice to the defendant, for a quarter of a century. In answer to such a suggestion, there is, in the first place, the silence of the books on the subject; in the second, the practice of the courts of law; and in the third, if there is any gross or improper delay between the time of filing the bill and serving process, a court of equity is not prevented from denying efficacy to the claims of the

plaintiff, or providing for the defence of the defendant. In their answer, the defendants have claimed the benefit of the statute in general terms, and have not made any case of the delay in serving the subpoena. If they had done so, the plaintiffs might have been enabled to meet that case by supplemental bill or otherwise. I decline to establish the proposition contended for by the defendants. Before parting with this case, I wish to be understood, that I am not to be considered as deciding, whether the lapse of six years can be successfully pleaded in answer to a demand on the separate estate of a married woman. I have assumed that proposition merely for the purpose of the argument.

M.R. }
Jan. 15. } WENTWORTH v. WILLIAMS.

Legacy — Construction — Joint Tenancy — Survivorship.

A testatrix bequeathed as follows:—"As to all the rest of my personal estate, I give the same to A. B, C. D, &c., upon trust to pay one third part to P. S. T. for her own proper use; as to the remaining two thirds, in trust to invest the same and receive the dividends, and pay the same for the use of F. J. T. and C. H. T, for and during the term of their natural lives; and after the decease of either of them, the said F. J. T. and C. H. T, then in trust to pay one fourth part of the said trust fund unto P. S. T, to and for her own use and benefit, and to pay the dividends and profits of one other fourth part of the said trust fund, unto the survivor of them, the said F. J. T. and C. H. T, to and for his use, for and during the term of his natural life; and from and after the decease of the survivor of them, the said F. J. T. and C. H. T, in trust to pay, assign, transfer, and set over the said trust fund, together with all interest that shall be due thereon, unto P. S. T, to and for her own proper use and benefit." P. S. T. died in 1821, F. J. T. in 1831, and C. H. T. in 1837:—Held, that C. H. T. was entitled on the death of his brother F. J. T. to three-fourths of the two-thirds of the income of the trust fund.

Sarah Tubb, by her will, dated the 29th of December 1813, gave her freehold estates

to trustees, upon trust to pay the rents and profits for the benefit of her children Philipine Sophia Tubb, Frederick John Tubb, and Charles Henry Tubb, in equal shares and proportions for their respective natural lives, and in case of the death of those parties without leaving issue of his or their body or bodies lawfully begotten, she gave the share of the party so dying, of and in the rents of the freehold estates, unto the survivors for their joint lives, and after the decease of either of such survivors she gave the freehold estates unto the survivor of them, his heirs and assigns; "and as to all the rest, residue and remainder of her personal estate and effects not disposed of, she gave and bequeathed the same unto the same trustees, upon trust to pay one third part thereof unto her daughter the said P. S. Tubb, to and for her own proper use and benefit, and as to the remaining two third parts thereof, in trust to place the same out at interest on government or other good security, and from time to time receive the interest, dividends, and annual produce thereof, and pay and apply the same unto and for the use and benefit of the said F. J. Tubb and C. H. Tubb, for and during the term of their natural lives; and from and after the decease of either of them, the said F. J. Tubb and C. H. Tubb, then in trust to pay one fourth part of the said trust fund unto her daughter P. S. Tubb, to and for her own proper use and benefit, and to pay and apply the interest, dividends, and profits of one other fourth part of the said trust fund, unto the survivor of them, the said F. J. Tubb and C. H. Tubb, to and for his use, for and during the term of his natural life; and from and after the decease of the survivor of them, the said F. J. Tubb and C. H. Tubb, in trust to pay and assign, transfer, and set over the said trust fund, together with all interest that should be then due thereon, unto the said P. S. Tubb, to and for her own proper use and benefit;" and she appointed P. S. Tubb, John Williams, and three other persons, joint executrix and executors of her will.

The testatrix died in January 1816, leaving F. J. Tubb, C. H. Tubb, P. S. Tubb, and A. B. Tubb, her only children and next-of-kin. The defendant Williams, proved her will, and paid one third part of the residue of the testatrix's personal estate to P. S. Tubb absolutely, and the remainder of the residue

was invested. P. S. Tubb died in 1821. In 1834, C. H. Tubb was found to have been a lunatic since 1826, and died a lunatic in 1837, and F. J. Tubb died in 1831.

By an order made in the lunacy, dated the 11th of July 1835, J. W. Thompson was appointed the committee of C. H. Tubb. Letters of administration of the estate and effects of C. H. Tubb were granted to the plaintiff on C. H. Tubb's decease.

Mr. Pemberton and *Mr. B. Parry*, for the plaintiff.—In this case one third of the residuary personal estate is given absolutely to the daughter; the remaining two thirds form the trust fund, which may be considered as divided into four equal parts; in which case the plaintiff contends, that two fourths of the income went to one son, and two fourths to the other son, during their joint lives; and that when either of the two sons named died, two fourths of the income enjoyed by him became relinquished, but the surviving brother did not lose his own two fourths of the income, and took by express bequest another one-fourth of the income; when, however, the surviving brother died, the whole fund became the absolute property of their sister. The cases are clear as to the right of the survivor to take. In *Doe d. Borwell v. Abey* (1), the Court rejected words of severance, and held the parties to be joint tenants—*Doe d. James v. Hallett* (2), *Vin. Abr. 'Joint Tenants,'* (D), pl. 4. p. 476, ed. 1793. If nothing be given over until the death of the survivor, the words of the will will be converted into an interest for the survivor. The sister was intended to take the trust fund absolutely, but her enjoyment thereof was postponed to the death of the survivor of the two sons. The words "together with all interest" merely mean, any interest accruing by the actual transfer.

Mr. Tinney, for the personal representative of P. S. Tubb.—The first part of the gift is during the natural lives of the two sons, and therefore lasted only so long as the two lives continued. The estate having expired on the death of the first of the two lives, the testator then proceeds to provide for what shall then be done; and if one-fourth only of the trust fund is given to the daughter, how then can more than one-fourth of

the income thereof go to the brother?—*Cambridge v. Rous* (3). The intermediate income, consisting of general residue, goes to the sister, and the testator thinking there may be part of the income due on the death of the surviving brother, makes use of the expression found in the will, viz. "together with all interest." If there be not a gift to the residuary legatee, then there must be an intestacy as to the portion not well given. In *Doe v. Abey*, cited for the plaintiff, there was a gift over after the death of the two parties mentioned in the will.

Mr. G. Turner and *Mr. Willcock*, for the defendant Williams, the surviving trustee and executor under the will of the testator, admitted that he had monies in his hands, part of the lunatic's estate, but which he submitted he had a right to retain in discharge of the costs and expenses of suing out and prosecuting the commission of lunacy against C. H. Tubb, which had never been paid. They cited *Clarke v. Cort* (4).

The MASTER OF THE ROLLS, after observing that the will was very imperfectly expressed, proceeded as follows :—The residue of the personal estate was intended by the testatrix, for the benefit of one of her children only, viz. her daughter; but whilst the other two children, viz. F. J. Tubb and C. H. Tubb, were living, they were to take a beneficial interest in the income thereof. The testatrix in the first place bequeaths one-third of the residuary estate to her daughter P. S. Tubb absolutely, and then gives the interest of the remaining two third parts to her two sons for the term of their lives; but on the death of either of those sons, she takes out of the two-thirds one fourth part thereof, and gives it to her daughter absolutely; and the interest of another one-fourth part she gives to the survivor of her two sons for life, and after the decease of the survivor, she gives the fund, with all interest then due thereon, for the use and benefit of her daughter. The testatrix's intention was, to give to each son, during the lives of both of them, an equal share in the income of the two-thirds of the residuary estate, and, on the death of either of her sons, to place the surviving son on something like an equality

(1) 2 Powell on Dev., by Jarman, 753.

(2) 1 Mau. & Selw. 124.

(3) 8 Ves. 12.

(4) 1 Cr. & Pl. 154; s.c. 10 Law J. Rep. (N.S.) Chanc. 113.

as regarded the income with her daughter, and on his death only to give the trust fund to her. The testatrix, in my opinion, clearly intended, on the decease of either of her two sons, after appropriating for the absolute use of her daughter one fourth part of the trust fund, to give the income of the remaining three fourth parts to the surviving son.

K. BRUCE, V.C. } SMITH v. STICKWOOD.
Jan. 21, 22.

Contempt—Order of Committal.

A defendant who had obtained a month's time for answering, on condition of consenting to a serjeant-at-arms, as directed by the 21st Order of 1833, was, in default of putting in an answer, taken into custody. In consequence of an irregularity in the order of committal, he was, on motion made for that purpose, discharged from custody, but the order itself was not discharged. Further default having been made, a second order of committal was issued, under which he was taken into custody:—Held, that the second order was regular.

The bill in this case was filed the 5th of February 1841. On the 16th of June the defendant obtained a month's time for answering, on condition of consenting to a serjeant-at-arms, as directed by the 21st Order of 1833. The answer not being put in within the time allowed, an order was issued, under which the defendant was committed to the custody of the serjeant-at-arms on the 21st of July, but, in consequence of an irregularity, (the order not having been entered in the registrar's book,) the defendant was, on motion made before the Vice Chancellor of England, discharged from such custody. The order itself, however, was not discharged. On the 21st of July, the defendant put in his answer, to which exceptions were taken on the 16th of December, and, the answer having been reported insufficient, a second order of committal was issued on the 21st of December, under which he was committed to the custody of the serjeant-at-arms.

Mr. Anderdon now moved, that the defendant should be discharged from such custody, on the grounds,—first, that the order under which he had been committed had

recited the fact of his former committal, without noticing his discharge; secondly, that the first order had not been discharged; and, thirdly, that two attachments could not issue for the same matter.

Mr. Montagu, contra, cited *Morris v. Smith* (1).

KNIGHT BRUCE, V.C.—The only difficulty in this case arises from the circumstance of the order of the 21st of July not having been discharged. I have had much doubt whether the caption, made before the former order was discharged, was regular; but I have been informed, by the registrars, that the order is right. There is no solid foundation for the application, but, it being a case of doubt and difficulty, I will not give costs. The plaintiff's costs to be costs in the cause; the defendant to pay his own costs.

K. BRUCE, V.C. } LLOYD v. LLOYD.
Jan. 31.

Process—Infant—Substituted Service.

An order, that service on the father of an infant defendant should be good service on the infant, granted, on an affidavit, stating the refusal of a father to say where his child was, the age of the child, and that the usual residence of the child was with his father.

Mr. Amphlett moved, that service on the father of an infant, a defendant in the cause, should be good service on the infant, on the ground, that the father had refused to say where his son was to be found. He cited *Baker v. Holmes* (2) and *Thompson v. Jones* (3).

KNIGHT BRUCE, V.C., required to be informed what was the age of the infant, and whether his usual residence was with his father, and, an affidavit having been produced in the course of the day answering these questions satisfactorily, granted the order.

- (1) 8 Sim. 33.
- (2) 1 Dick. 18.
- (3) 8 Ves. 141.

K. BRUCE, V.C. }
Jan. 31. } SPROTT v. STRANGE.

Appearance.—8th New Order of 1841.

The Court will direct the senior six clerk not towards the cause to enter an appearance for a defendant at the instance of the plaintiff, under the 8th New Order of 1841.

Mr. Wood moved, that the plaintiff might enter an appearance for a defendant, according to the terms of the 8th New Order of 1841, but said, that there was a difficulty, as that order had not stated who was to act as clerk in court for such a defendant.

KNIGHT BRUCE, V.C., directed that the senior six clerk not towards the cause should enter such appearance.

M.R. 1841.	} WOODCOCK v. REN- NECK.
May 6; June 21, 28.	
L.C.	
Nov. 8, 10, 16.	
1842. Jan. 31.	

Will—Construction—Power—Survivorship—Joint Tenancy—Vested Interest.

*J. L. bequeathed (inter alia) as follows:—“And as to the sum of 1,700*l.* 4*l.* per cent. consolidated bank annuities, in trust, to pay the yearly dividends thereof to Joseph Christie and Sarah his wife during their lives, and the life of the survivor, and after their decease, then in trust to transfer or pay over the said stock unto their children, in such shares and proportions as the survivor of them, the said Joseph Christie and Sarah his wife, by his or her last will, shall direct or appoint.”*

*The testator died in September 1817. The executors proved the will, and invested the sum of 1,700*l.* stock in their names, as directed by the testator. Joseph Christie and Sarah his wife had three children only living at the death of the testator, viz. J. L. C. (since deceased), E. C, who afterwards became E. R, the wife of J. S. R, and W. L. C, who died whilst only a few months old. J. L. C. afterwards intermarried with C. R. W, and died intestate in*

1832, when C. R. W. became her administrator. On the 21st of August 1820, S. Christie died, leaving her husband, Joseph Christie, surviving her, and he, by his will, dated the 16th of October 1833, appointed the trust fund as his daughter, E. R, should appoint, notwithstanding her coverture. The bill being filed by C. R. W, as the legal personal representative of his deceased wife, it was held, that the power given by the will of J. L. was well executed in favour of E. R.

William Linton, by his will, dated the 3rd of February 1814, after giving all his personal estate to Richard Wardell, John Sard, Thomas Fielden, and Stephen Elliott, as trustees, and after bequeathing divers legacies, proceeded as follows:—“And as to the sum of 1,700*l.* 4*l.* per cent. consolidated bank annuities, in trust, to pay the yearly dividends thereof to Joseph Christie and Sarah his wife, during their lives, and the life of the survivor, and, after their decease, then in trust to transfer or pay over the said stock unto their children, in such shares and proportions as the survivor of them, the said Joseph Christie and Sarah his wife, by his or her last will, shall direct or appoint.” The testator died in September 1817, and left his several trustees, whom he appointed his executors, and also Joseph Christie and Sarah his wife, surviving him. The executors proved the testator's will, and invested a sum of 1,700*l.* 4*l.* per cent. consolidated bank annuities, afterwards converted into 3*½**l.* per cent. bank annuities, in their joint names, to answer the trusts declared thereof by the will. Joseph Christie and Sarah his wife had three children only, living at the death of the testator, viz. Joyce Linton Christie (since deceased), and Eleanor Christie, who afterwards became the wife of the defendant, John Sebastian Renneck, and W. L. Christie, who lived only eighteen months. Joyce Linton Christie afterwards intermarried with Cornelius Richard Woodcock, the plaintiff, and died intestate in the year 1832, upon which the plaintiff obtained letters of administration to be granted to him of her goods, chattels, and effects. On the 20th of August 1820, Sarah Christie died, leaving her husband her surviving, who, by his will, dated the 16th of October 1833, after reciting the power of appointment contained in the will

of William Linton, appointed and directed the trustees named therein to pay and apply the sum of 1,700*l.* 3*¼* per cent. consolidated bank annuities, and dividends thereof, as his daughter and only child by his deceased wife, Eleanor Renneck the wife of defendant John Sebastian Renneck, should, from time to time, notwithstanding coverture, direct and appoint, for her own sole and absolute use and benefit. The plaintiff, as the legal personal representative of his deceased wife, and in her right, upon the decease of Joseph Christie, claimed to be absolutely entitled to an equal moiety, or at least to one-third part of the trust fund, insisting, that no valid appointment had been executed thereof by Joseph Christie, by will or otherwise, and that Joseph Christie had no power to make any valid appointment of the whole of the trust fund; and that, after the death of Joyce Linton Woodcock, no power subsisted so as to enable Joseph Christie or Sarah his wife to execute any valid appointment whatsoever of the trust fund.

The defendants, J. S. Renneck and Eleanor his wife, insisted that, after the death of J. L. Woodcock, the power contained in the will of Wm. Linton subsisted so as to authorize and enable Joseph Christie to execute a valid appointment, by his will, of the whole of the trust fund; that the power, according to its true construction, authorized an appointment of the trust fund to such child or children of Joseph Christie and Sarah his wife, as should be living at the decease of the survivor of them, and that even if the appointment was invalid, yet Eleanor Renneck, as the only child of Joseph Christie and Sarah his wife, living at the death of those persons, or the said J. S. Renneck, in her right, was entitled, under the will of John Linton, to the whole of the trust fund.

The defendant, John S. Renneck, having, subsequently to the filing of the original bill, taken the benefit of the Insolvent Debtors Act, his assignees were made parties by supplemental bill.

Mr. Pemberton and *Mr. Roupell*, for the plaintiff, cited the following cases—

Campbell v. Sandys, 1 Sch. & Lef. 281.
Bellasis v. Uthwatt, 1 Atk. 426.
Casterton v. Sutherland, 9 Ves. 445.

Butcher v. Butcher, 1 Ves. & Bea. 92.
Hockley v. Mawbey, 1 Ves. jun. 143.
Vanderzee v. Aclom, 4 Ves. 771.
Grievson v. Kirsopp, 2 Keen, 653; s. c. 6 Law J. Rep. (N.s.) Chanc. 261.
Reade v. Reade, 5 Ves. 744.

Mr. Kindersley and *Mr. Dixon*, for the defendants, Renneck and wife, contended, that the power was good and well exercised, and that no authority could be cited to prove that the power was gone; that in *Boyle v. the Bishop of Peterborough* (1), it was decided, that if there were three objects of the power, and one died, the power might be exercised in favour of the two survivors; that the expression used by the testator in the present case, was tantamount in effect to the words, "such children;" and that if the power was not well executed, still only those could take the fund who were living when the power was exercised, *i. e.* at the death of the surviving tenant for life.

Alexander v. Alexander, 2 Ves. sen. 640.

Bray v. Hammersley, 3 Sim. 513.
Bray v. Bree, 2 Cl. & Fin. 453.
Houstoun v. Houstoun, 4 Sim. 611; s. c. 1 Law J. Rep. (N.s.) Chanc. 50.
Phipson v. Turner, 9 Sim. 227 & 246.
Needham v. Smith, 4 Russ. 318; s. c. 6 Law J. Rep. Chanc. 107.
Walsh v. Wallinger, 2 Russ. & Myl. 78; s. c. 9 Law J. Rep. Chanc. 7.
Kennedy v. Kingston, 2 Jac. & Walk. 431.

Mr. Turner and *Mr. Busk*, for the assignees of J. S. Renneck.—Assuming that the power was not well exercised, the plaintiff can have no claim to any part of the trust fund, inasmuch as the surviving child would take it. The plaintiff's arguments throw out of consideration the words, "in such shares and proportions," and are founded on the words of direct gift only, and reject the words of division entirely. In *Crook v. Brooking* (2), there were six objects of the gift, and only one survived the donee of the power, and the power not having been well exercised, that one object was held to take the fund exclusively.

(1) 3 Bro. C.C. 243; s. c. 1 Ves. jun. 299.
 (2) 2 Vern. 50 & 106.

Brown v. Pocock, 6 Sim. 257.

Spencer v. Bullock, 2 Ves. jun. 687.

Campbell v. Campbell, 4 Bro. C.C. 15.

The Duke of Marlborough v. Lord Godolphin, 2 Ves. sen. 61.

Doe d. Stewart v. Sheffield, 13 East, 526.

THE MASTER OF THE ROLLS, after stating the facts of the case, proceeded as follows:—The plaintiff, the legal personal representative of his late wife, says, it was a mere power that was given in this case to the surviving parent to appoint amongst children, and that as there was only one child living at his death, the power was incapable of execution, and that he, the plaintiff, therefore, as the legal personal representative of his late wife, was entitled to one equal third part of the trust fund. The defendant, Mrs. Renneck, says, the power was properly executed by Joseph Christie in her favour, and further says, that if the power were not well exercised, still the plaintiff is not entitled to any part of the trust fund, inasmuch as the trust fund became the property of herself, as the only child of Joseph Christie and Sarah his wife living at the death of the survivor of them. Now, the plaintiff must shew he took a vested interest in the fund, otherwise it is immaterial whether the power was executed or not; and there is here no gift over in default of appointment. It is then said, on the part of the plaintiff, that each child took a vested interest in the trust fund; and that the surviving parent had only power to determine the amount and proportion which each child should take; on the other hand, the defendant, Mrs. Renneck, insists that there is no direct gift, but only a power given to be exercised by the surviving parent; and that she, as the sole surviving child of her parents, took the whole fund, or if she did not become entitled to the trust fund in that manner, still she took it as the survivor of the several children of Joseph Christie and Sarah his wife, who were joint tenants of the fund. I have read the cases that were cited at the bar, and it is certainly not an easy matter to reconcile them all; my opinion however is, that in this case there is a gift to the children of Joseph and Sarah Christie, subject to a power to be exercised by the surviving parent. In putting a construction upon a clause like the present, the whole sentence comprising the

power requires consideration, and the generality of expressions used by the testator, in the former part of this sentence, may be properly limited by the other words found in the same sentence. In this case I do not consider there was an express gift by the testator to the children of Joseph and Sarah Christie, but that the words used by the testator evidently had in view a distribution of the trust fund; and that the objects of the power were children living at the death of the survivor of Joseph and Sarah Christie.

From the judgment of the Master of the Rolls, an appeal was presented to the LORD CHANCELLOR, which was argued before his Lordship on the 8th, 10th, and 16th of November 1841; and on the 31st of January 1842, his Lordship affirmed the judgment of the Master of the Rolls.

K. BRUCE, V.C. }
Jan. 22, 26, 31. } VICKERS v. OLIVER.

Assets—Statute of Limitations—Length of Time.

A testator, by his will, dated in 1818, charged all his real and personal property with, or devised it for, the payment of his debts, and died soon after. In 1820, A, a simple contract creditor, filed a creditors' bill against G. W. M., the devisee in trust of the testator, S. C. M., his wife, who was his heiress-at-law, and other parties, praying an account of all the freehold estates of which the testator had died seised. The testator had, in fact, died intestate as to Whiteacre, but it was supposed by all parties that it had been included in the devise, and it was inserted as such by G. W. M. and S. C. M. in the schedule to their answer. Witnesses were examined, and publication had passed, when S. C. M. died. The bill was not revived against her heir. A decree was made, directing an inquiry as to all the estates of which the testator had died seised, and that a sufficient part should be sold. In 1840, A. filed a supplemental bill against O, the heir-at-law of S. C. M., for the purpose of having Whiteacre sold, and having the purchase-money applied for the payment of the debts of the testator:—Held, first,

that Whiteacre had been properly put in litigation by the original bill, and that the Statute of Limitations did not apply; and secondly, that the plaintiff, though not exempted from the charge of delay, was, under the circumstances, (particularly stated in the report,) not barred by length of time.

William Cheney Hart, by his will, dated in 1818, after devising a freehold house in Barker Street, Shrewsbury, to a person, who died in his lifetime, for her life, directed that all his just debts, funeral expenses and legacies, should be payable out of his estate, real and personal, and devised all his property and estate real and personal, whatsoever and wheresoever, in possession, reversion, or remainder, to G. W. Marsh, his heirs, executors, and administrators, upon trust to raise, by sale or mortgage of all or any part thereof, a sufficient sum to pay all such debts and legacies, and directed that the said G. W. Marsh should pay the surplus upon the trusts therein mentioned, with an ultimate trust, on the contingencies therein mentioned, for his heir-at-law, and made G. W. Marsh the executor of his will.

The testator died in 1818, leaving Sarah Cheney Marsh, the wife of G. W. Marsh, his heiress-at-law.

In 1820, the plaintiff Vickers, a simple contract creditor of the testator, on behalf of himself and all other the creditors of the testator, filed a bill against G. W. Marsh and his wife, and the parties interested in the real estate of the testator under his will, praying the usual accounts as to the personalty, and that an account might be taken of all the freehold estates which the testator was seised of, or entitled to at the time of his death, and the rent due in respect thereof, and that the said testator's said freehold estates, or such part as might be necessary, should be sold for the payment of his debts, and that proper directions might be given for marshalling the assets of the testator. The bill did not specifically pray any separate account of the devised and descended estates. Between the date of the testator's will and his death, he had suffered a recovery of the house in Barker Street, and, as he had not republished his will, he had died intestate as to that property. It was, however, taken for granted, that the property

had passed by the will. Mr. and Mrs. Marsh included it, in the schedule to their answer, in the testator's devised estates; and the same view was taken by the plaintiff. Upon the coming in of the answers, a receiver was appointed of the real estate of the testator, and the description included, or was intended to include, this house. It did not appear, however, that he had ever acted. Witnesses were examined, and publication passed. In this state of the suit, and in March 1822, Mrs. Marsh died, leaving, as it was supposed, Ann Marsh, who, in respect of some interest in the real estate, was one of the defendants to the bill, her heiress-at-law; and it was not thought necessary to file a bill of revivor.

A decree was obtained in 1822, by which, among other things, the Master was directed to inquire, in case of deficiency of personal estate, what real estate the testator died seised of, and that the same or a sufficient part thereof should be sold. In 1828, it was discovered that Ann Marsh was not the heiress of Mrs. Marsh, but that the defendant Oliver was such heir; and in order to avoid making Oliver a party, by agreement between the parties, a release was given by Oliver to Marsh, of all his estate and interest under the will of the testator, but which affected nothing but what might have come to him under the will. In 1840, a bill was filed by Vickers, on behalf of himself and other unsatisfied creditors, against Oliver and a trustee of the term affecting the house, stating the above facts, and that all the specialty creditors had been paid in full, while the simple contract creditors had been paid only in part; and praying that that suit might be supplemental to the original suit, and that the house might be sold, and the assets of the testator marshalled, so that they might have the benefit of the purchase-money of this estate to the extent that the specialty creditors had been paid out of the personalty. To this bill Oliver pleaded the Statute of Limitations.

It was stated, at the bar, that the house was at the time of filing the original bill, and had been for many years, unoccupied, and that about 1837 Oliver, for the first time, applied for and received the rents, and that he was then in the receipt thereof; but no explanation was given as to the time when it was first discovered that the estate

had not passed by the will, or why the plaintiff had not taken steps earlier. This supplemental cause now came on to be heard.

Mr. Russell and *Mr. Bigg*, for the plaintiffs.—The rule established by *Manning v. Spooner* (1), *Milnes v. Slater* (2), and *Barnewell v. Lord Cawdor* (3), is, that where a testator has made a specific devise of real estate for the payment of debts, the devised estates must be applied before descended estates; but when he has merely made a charge of debts on his real estates, the descended estates must be first applied. Here the testator had merely charged his estates with the payment of his debts, and the descended estates ought to have been applied in the first instance. The estate in question was therefore properly in litigation at the time of filing the bill and the decree. The Court will direct assets to be marshalled whenever the justice of the case requires it—*Gibbs v. Ougier* (4).

Mr. Simpkinson and *Mr. Eagle*, for the defendant Oliver, argued, that the estates had been specifically devised for the payment of debts, and ought to have been first applied; and that, if the descended estates had been the subject of the original suit, there would have been a special inquiry directed by the decree as to them. The descended estates were not the subject of litigation at all in the original bill, and the Statute of Limitations, pleaded by the answer, therefore barred the right of the plaintiff. They relied also on the length of time and the staleness of the demand.

Mr. Oliver, for the trustee of the term.

Mr. Russell, in reply.

KNIGHT BRUCE, V.C.—[after stating the facts of the case].—The defence set up by Oliver is the Statute of Limitations, and length of time. There are two questions to be considered: first, whether the Barker Street estate was properly made the subject of litigation, and included in the original bill; and secondly, whether the rights of the plaintiff are barred by length of time. I have had much doubt on these questions, but I think the claims of the plaintiffs ought to be allowed. There is, to use an expres-

sion of Lord Eldon, great penury of allegation in the original bill; but there are interrogatories directed, and the prayer extends to all the estates of which the testator died seised. Had the answer stated the situation of this property, the plaintiff might have amended the bill; but there is no such statement or amendment; and all parties relied on the supposition, that the testator was seised in fee. I do not forget that Mrs. Marsh was a feme covert; but, if the cause had been brought to a hearing in her lifetime, and had the true state of the title been then mentioned, the reference to the Master would have contained an inquiry directed to that point, and, upon the report shewing the state of this property, it would have been competent to the Court, and consistent with the justice of the case, to have rendered it available to the claims of the plaintiff by marshalling assets. The case of *Gibbs v. Ougier*, though not precisely in point, is very much to the purpose. This property, I think, was, on the death of Mrs. Marsh, in litigation at the suit of the plaintiff. The long time between Mrs. Marsh's death and the present bill is not satisfactorily accounted for, and the plaintiff is not exempted from the charge of delay; but *Hollingshead's case* (5), and other cases of that class, shew, that this ground is not sufficient to warrant the dismissal of the bill. There was an order for a receiver; and though it does not appear that it was ever acted on, it is sufficient that it has never been discharged or varied. On the whole, under the circumstances of the case, I cannot hold the plaintiff precluded from the usual decree.

V.C. }
Jan. 11. } SALISBURY v. MORRICE.

Principal and Agent—Wilful Default.

Upon a bill filed against the executors of a land steward and paid agent, it was held, that his estate was liable to make good such sums, as, but for his wilful neglect and default, he might have received.

The bill stated, that, by the will of Francis Webb, dated the 1st of August 1812, certain

(1) 3 Ves. 114.
(2) 8 Ibid. 295.
(3) 3 Mad. 453.
(4) 12 Ves. 416.

(5) 1 P. Wms. 742.

estates were vested in trustees for the sole and separate use of the plaintiff, his only child, for life, and, after her decease, for her children, in manner therein mentioned. The plaintiff was appointed the residuary legatee and sole executrix of the will, which was duly proved by her. That the testator, up to his death, had carried on the business of land-agent, in partnership with his nephew, Richard Webb, since deceased, and Richard Attwood; that, upon the death of the testator, the said Richard Webb undertook to act on behalf of the plaintiff, as the executrix of her father, and to be her agent and manager in carrying into effect the trusts of the will; that it was arranged Richard Attwood should manage a part of her estates, which he did to her entire satisfaction; that Richard Webb continued to act as such agent and receiver for the plaintiff, from the death of the testator up to the time of his own death, in March 1837; that no express agreement was made between the plaintiff and Richard Webb, as to the amount which the plaintiff was to allow him as such agent and receiver, but it was understood he should receive the same as he and as Francis Webb had charged other persons for whom they had acted as receivers, which was 8*d.* in the pound, and the plaintiff was willing to allow a reasonable sum for any additional trouble the said Richard Webb might have had in acting as agent for her, under the said will; that Richard Webb received for the plaintiff, at various times, many large sums, and that plaintiff, from time to time, repeatedly and earnestly requested Richard Webb to furnish her with his account, which, however, he neglected to do; that he died in March 1837, and, by his will, appointed the defendants, Walter Morrice and David Halket, his executors; that an account was then furnished to the plaintiff by Richard Webb's executors, by which a sum of 11,211*l.* appeared to be due to Richard Webb's estate from the plaintiff; that plaintiff, from those accounts, and otherwise, had discovered that Richard Webb had grossly neglected his duty to her as agent and receiver; that he had permitted the rents to run greatly and improperly in arrear, and large losses were incurred thereby. The bill then set out a vast number of instances in which Richard Webb had allowed the rents to run in arrear with numerous tenants; and though, in

some cases, he had distrained upon the tenants after an arrear of several years, and had obtained a small portion of their rents, yet, in most cases, the arrears were totally lost by his neglect; that Richard Webb, but for his wilful neglect or default, might have received various large sums of money, due to the testator's estate at the time of his death, which could not now be recovered on account of the lapse of time, without any demand having been made; and that the various sums which Richard Webb might, but for his wilful default, have received, far exceeded the sum which his executors stated to be due from the plaintiff.

The bill prayed that an account might be taken of all sums of money, which, from the time of the death of the testator, Francis Webb, were received by Richard Webb as the agent or receiver of the plaintiff, as executrix of the testator's will and codicil, and also as the agent or manager of the plaintiff in carrying the trusts of the said will and codicil into effect, and also as bailiff or agent of the plaintiff as tenant for life of the estates comprised in the said will, or which, without his wilful neglect or default, might have been received by him, and a like account of all sums of money properly paid by the said Richard Webb for the use of the plaintiff; and that, in taking the said accounts, interest after the rate of 5*l.* per cent. might be charged upon the balances from time to time due from him or his estates, with half-yearly rests; and that, under the circumstances, the said Richard Webb might be declared not entitled to any commission, but to such sums only as (if any) should be found a reasonable remuneration for the time actually given by him to the plaintiff's affairs, and that the estate of the said Richard Webb might be decreed liable to pay to the plaintiff what, upon taking the accounts, should be found due to the plaintiff.

Mr. Richards and *Mr. G. Lake Russell*, for the plaintiff.

Mr. Stuart and *Mr. Stevens*, for the defendants.

January 11.—The VICE CHANCELLOR, after having taken time to consider his judgment, said:—The first point to be considered was, in what respect *Mr. Richard Webb* had acted as the agent of *Mrs. Salisbury*, the plaintiff. He considered that, according

to the collected statements on both sides, Mr. Webb was an agent for Mrs. Salisbury in her character of executrix of her father's will, and also as agent for the execution of the trusteeship which was created under the will, the trustees actually being Lord Malmsbury and his brother : and it appeared that, although there was no express agreement, yet, in respect of the agency as land steward, it was understood he was to have it upon the same terms as Mr. Webb had acted for other persons, and Mrs. Salisbury said she was quite willing to allow a fair compensation for the trouble Mr. Webb might have had as agent. It would, therefore, be proper to direct the Master to inquire what was a proper compensation for the trouble that Mr. Richard Webb had in his character of agent of Mrs. Salisbury as executrix, and in respect of the trusteeship or otherwise. His Honour then continued :—The next question is, how the decree should be framed in respect of the contested question, whether there was wilful default or not. With respect to that, the evidence of Castleman, Beer and Attwood, and the exhibits to which they refer, conclusively prove that, but for the wilful default of Richard Webb, the debt due from Lord Anglesey to the partnership of Webb & Attwood might have been received by Richard Webb for the benefit of the estate of Francis Webb, to the amount of 138*l.* 8*s.* 9*d.* ; at least Castleman made repeated applications for the bill, and Attwood repeatedly reminded Richard Webb of it, but he did nothing. By way of excuse, it is said, that, under the articles of the 29th of September 1809, it was Attwood's duty to get in the debt : so it was ; but it was also the duty of Richard Webb, and it was, therefore, more incumbent upon him, as agent for the executrix of Francis Webb, to take care that the debt should be paid. It is further said, that Francis Webb's estate was largely indebted to Lord Anglesey. By the schedule annexed to the deed of the 29th of October 1828, it appears that the debt was not due to Lord Anglesey, but to trustees for purchase-money. By the codicil to Francis Webb's will, it seems it was due to Lord Anglesey and his trustees. But to whomever it was due, it was wholly paid off on the 6th of June 1817 ; yet, for nearly twenty years after that time, Richard Webb took no notice of the

debt due to the partnership : in that respect, therefore, a case of wilful default is clearly established. Pattison's evidence, and the entries in the ledger of Webb & Attwood, also make out a wilful default on the part of Richard Webb. He might have received the balance of 122*l.* 12*s.* 7*d.*, if he had only asked for it. The evidence of Davis himself, and of Attwood, in the strongest manner prove a wilful default on the part of Richard Webb, for Davis was both willing and able to pay his rent, and it was in arrear from time to time only because he was not asked to pay it. Of many other alleged instances of wilful default, I say no more than that they must be considered by the Master. I entirely accede to what was said by Mr. Stuart, that it cannot be the duty of an agent or steward, as soon as rent is in arrear, to distrain : landlords, who live by their tenants, must let their tenants live by them. The landlord's power must be used with discretion and forbearance, even out of due regard to his own interest ; at the same time it is possible that too much indulgence may be shewn, which may induce a tenant to continue in a bad course, which will be ruinous to himself and prejudicial to the landlord ; and it may happen that, without exercising any discretion, a steward may be negligent. Upon the whole, I am of opinion, that, in taking the account, Richard Webb's estate should be charged with what he might have received but for wilful default. It is not necessary to give any direction as to not disturbing any settled account, for I cannot consider the schedule to the deed of the 29th of October 1828, as an account settled between Richard Webb and Mrs. Salisbury, and it is not pretended that there was any other settled account. I cannot at present give any direction as to the disputed items arising out of the agency to Lord Plymouth. It is not the province of the Court, at the hearing, in a case constituted like the present, to decide whether specific items shall be introduced into the account or not. What I propose is, to decree that an account be taken of all sums of money which from the time of the death of the testator were received by Richard Webb, as the agent or receiver of the plaintiff as executrix of the will of the testator, and also as her agent or manager in carrying the trusts of the said will into effect, and also as her bailiff or agent as

tenant for life of the estates under the said will, and which, without his wilful neglect or default, might have been received by him; and a like account of all sums properly paid by Richard Webb and Richard Attwood, to or for the use of the plaintiff, in her own right as tenant for life, or properly paid Richard Webb in respect of her executorship, or in respect of the trusts of the said will; and that an account be taken of what is due and owing to the estate of Richard Webb, in respect of the allowance or commission of 8*d.* in the pound. I observe that the prayer of the bill is constructed in this manner, to charge the agent at once with what he might have received but for his wilful default, and also to disallow him the commission which was due to him as an agent: there is certainly an inconsistency in that, because, as a voluntary agent, he could only be charged with what he might have received, he being not a trustee or executor; but his liability to be charged in respect of what he might have received but for his wilful default, arises in respect of his being the paid agent, and therefore bound to perform the duty; therefore I cannot say he should be charged with wilful default, and yet deprive him of his salary, which alone constituted him an agent responsible for wilful default. And let the Master ascertain what compensation ought to be allowed to the estate of Richard Webb for his services in acting as the agent of the plaintiff in her character of executrix of the will of Francis Webb, and as her agent in carrying the trusts thereof into execution, or otherwise; and let Morrice and Halket have credit in account for such compensation and commission accordingly. It is asked, by the prayer, that I should direct the account to be taken, with half-yearly rests, and charge interest. It appears to me, that it is quite impossible to make a decree, in the first instance, in that form.

M.R. }
Jan. 14. } CROCKETT v. CROCKETT.

Practice.—Advancement of Cause—Short Cause.

The Court will not order a cause to be advanced for hearing, unless it be certified to be a short cause, although one of the par-

ties, an infant, and interested in the funds in court in the cause, is about to sail immediately for India, and is desirous of having an outfit provided out of those funds.

Mr. Pemberton applied to have a cause advanced, and heard as a short cause. The question to be decided by the Court, arose out of a deed executed by a person, which appeared to be inconsistent with certain provisions contained in the will of the same person. Counsel could not undertake to certify the cause as proper to be heard as a short cause; and the ground of the application was the circumstance of one of the children of the testator, (for the administration of whose estates the suit was instituted,) being about immediately to sail for India, and requiring an outfit for that purpose, out of the funds in court in the cause.

His LORDSHIP expressed his regret, that he could not comply with the application, inasmuch as by granting it, he must necessarily postpone the hearing of other causes, to the hearing whereof, the parties interested had been anxiously looking forward for some time past, trusting that no unjust postponement would occur.

WIGRAM, V.C. }
Jan. 20. } TATHAM v. WILLIAMS.

Appearance—8th Order of August 1841
—Affidavit—Evidence of no Appearance.

Application to enter an appearance for the defendants, under the 8th of the Orders of August 1841, granted, upon an affidavit that inquiries as to the fact had been made of the clerk in court of the plaintiffs, and that the deponent had been informed by him, and believed it to be true, that no appearance had been entered.

It is the practice of the court to require that the affidavit of the service of the subpoena should go to the fact of the memorandum required by the 14th of the New Orders, being at the foot of such subpoena.

A motion was made under the 8th of the Orders of August 1841, for leave to enter an appearance for the defendants, M. A. B, and G. B. Two affidavits were made in support of the motion: first, the affidavit of L. W, of

L, that he did, on the 13th of December last, personally serve the defendants, M. A. B. and G. B, with a subpoena issuing out of, &c., by delivering and leaving with the said two defendants, respectively, true copies of the said subpoena, and of the indorsement thereon, &c.; secondly, the affidavit of X, (of London,) who deposed that he did, on the 12th of January instant, inquire of the clerk or agent of Mr. Smith, who acted as clerk in court for the above-named plaintiffs in this cause, whether the above-named defendants, M. A. B. and G. B, or either of them, had caused an appearance or appearances to be entered to the original and supplemental bill, &c. of the above-named plaintiffs, or to either of them; and that the deponent was then informed by the said clerk or agent of the said Mr. Smith, that the said defendants, M. A. B. and G. B, had not, nor had either of them, entered any appearance to either of the said bills, as he verily believed; and that the deponent verily believed that neither the said defendant M. A. B, nor the said G. B, had appeared to the said original and supplemental bill, &c. of the said plaintiffs.

Mr. Koe, for the motion, stated, that there was some difficulty in obtaining the certificate of the clerk in court; that the defendants had not appeared, and, consequently, an affidavit of that fact had been filed.

WIGRAM, V.C.—My own impression was, that it was not necessary that the affidavit of service should go to the fact of the memorandum being at the foot of the subpoena, as it must be held to be part of the subpoena. It appears, however, to be the usual practice to require it.

Order made.

M.R. }
Jan. 13, 22. } *In re LAW.*

*Trustee—Statute 1 Will. 4. c. 60.—
Petition—Construction.*

Under the 10th and 11th sections of the act 1 Will. 4. c. 60, the intended new trustee is the proper person to make the request in writing, therein required to be made, to the surviving or continuing trustees or trustee, and also to present the petition to the Court, for its order, in case of the refusal or neglect

of the surviving or continuing trustees, to make the necessary transfer.

The petition to be presented under the said act, should be entitled in the matter of the intended new trustee (naming him), and also in the matter of the particular trust and act of parliament 1 Will. 4. c. 60.

This was the petition of George Law, praying that some person might be appointed in the place of Joseph Price and Thomas Price, to transfer certain sums of stock from the names of Joseph Price, John Battelle Bowman, and Thomas Price, into the names of the said Joseph Price, Thomas Price, and the petitioner.

On the marriage of Francis Law with Eliza Evans, in 1824, several sums of stock were, by virtue of a settlement, executed on that occasion, transferred, upon certain trusts therein contained, into the names of Joseph Price, Joseph Brasbridge, and John Battelle Bowman; and in the settlement, a power was given to Francis Law, in the event of any of those trustees, or any future trustee, dying, or being unwilling to act in the execution of the trusts of the settlement, to nominate a fit person to supply the place of the trustee so dying or being unwilling to act, and after such appointment, the trust stocks were to be assigned, so as to vest in such new trustee jointly with the surviving or continuing trustees or trustee.

On the death of Joseph Brasbridge, the trust funds were transferred into the names of, and became vested in Joseph Price, John Battelle Bowman, and Thomas Price.

John Battelle Bowman, the acting trustee, died in the early part of the year 1839. Francis Law, by virtue of the power given him by the settlement, became desirous that the petitioner should be appointed a trustee of the trust funds, in the place of J. B. Bowman, deceased; and the petitioner in November 1839, wrote to Joseph Price, stating the wishes of Francis Law, and apprising him that a deed and power of attorney were in progress of being framed, to carry such wishes into effect.

A communication took place between the respective solicitors of Francis Law and of Messrs. Joseph and Thomas Price, relative to the requisite transfer of the trust funds jointly into their names and the name of the petitioner; and much correspondence

ensued between the petitioner and Messrs. Price, the result of which was, that the latter refused to make the requisite transfer of the trust funds. The last letter written by the petitioner to the Messrs. Price, and dated the 25th of January 1841, (being more than thirty-one days before the petition was presented,) called their attention specifically to the provisions of the statute 1 Will. 4. c. 60, and requested their compliance therewith, but no answer was returned to that letter. The accounts of the deceased trustee Bowman were submitted to Messrs. Price's inspection, by the petitioner, but in some instances required explanation, which the respondents insisted was not afforded to them. The petition did not pray payment of the costs of the petition by the Messrs. Price, and was intituled "In the matter of Law" only.

By the settlement, the dividends and interest of the trust funds were directed to be accumulated until the issue of the marriage should attain twenty-one. The only issue living (his mother having died many years back,) was an infant, Francis Law, who was entitled to maintenance out of the dividends of the trust funds.

Two objections were taken to the petition: first, that the petition was improperly intituled; and secondly, that the party who ought to apply for a transfer of the funds, by the surviving trustees, under the act 1 Will. 4. c. 60, was the party beneficially interested in the trust funds.

Mr. Tinney and *Mr. G. S. Law*, for the petition, contended, that it was not absolutely necessary that the petition should have any title or heading whatever prefixed to it; that it was sufficient to refer to the subject-matter of the petition; that the case before the Court was similar to applications made to the Court for liberty to make investments in Irish securities, under the act recently passed for that purpose, in which cases the officers of the court, in drawing up the orders, had struck out of the petition the title of the act of parliament; that taking the 10th and 11th sections of the act 1 Will. 4. c. 60, and considering them together, there could be no doubt the intended new trustee was the proper party to present the petition, and that the refusal of the Messrs. Price to comply with the petitioner's application and request, was on their part unreasonable.

Mr. Pemberton, for the Messrs. Price, contended, that the Court had no jurisdiction under the act in question, on the petition before the Court; inasmuch as according to the 10th section of the act, the request ought to have been made by the person beneficially interested in the trust funds, and not by the intended new trustee, the words of that section being, "if any such trustee or executor, or other person, shall neglect or refuse to transfer such stock to the *person entitled*," the person previously mentioned in the section being the person "*beneficially entitled*;" that two acts were necessary to be done in cases of this nature: first, the person *beneficially entitled*, was to make the request in writing for the transfer by the surviving trustees, and in case of the trustees' refusal or neglect to comply with such request, then either the intended new trustee, or the person beneficially entitled, might apply to the Court for an order directing such transfer; that the present petition was not properly intituled, for the title was merely, "In the matter of Law," and not in the matter of the particular trust or stocks; that the person named Law, at the head of the petition before the Court, might be an infant, or a bankrupt, or a trustee; that in the event of an indictment for perjury, in respect of an affidavit made on the petition, no conviction could ensue, inasmuch as the Court had only jurisdiction in the case under the act 1 Will. 4. c. 60.

The MASTER OF THE ROLLS, after stating the facts, proceeded as follows:—The title of the petition is simply "In the matter of Law," and the petition is not headed, in the matter of the act 1 Will. 4. c. 60, or in the matter of the particular trust; and I cannot say the Court has not jurisdiction under the present title. But it is inconvenient to have petitions of this nature so intituled; and there being no suit pending, nor anything else to give the Court jurisdiction, except the act of parliament, 1 Will. 4. c. 60, the petition must be amended, as regards its title, and it should be intituled in the matter of the act of parliament, and also in the matter of the trust. It is objected, that the request to the respondents was not made by the person *beneficially entitled*; but I think, on reference to the act, that there has been a suffi-

cient refusal on the part of the respondents, and that such refusal to the intended new trustee, brings the case within the act. It is then said, the refusal was not a reasonable refusal on the part of the respondents; but it seems that the deceased trustee, Mr. Bowman, was the acting trustee, and invested the dividends accruing due from time to time in the names of the three trustees, during his lifetime; and when trustees, as in the present case, possess a partial knowledge only of the particular trusts in which they are concerned, or of the transactions that have taken place relative thereto, they have a right to seek full and satisfactory information touching the same, before they are required to join in doing an act like that prayed for by this petition. On the whole, I think I ought to grant the order sought by the petition, but I am not satisfied that the respondents were not entitled to a little more attention and explanation from the other side, than they received. The petitioner is, in strictness, entitled to the order sought, without making any amendment in the title to his petition, but I think such amendment advisable.

The petition was afterwards amended, by intituling it, "In the matter of the settlement made on the marriage of Francis Law and Eliza Evans, and in the matter of an act of parliament passed in the first year of the reign of his late Majesty King William the Fourth, intituled, 'An act for amending the law respecting the conveyances and transfers of estates and funds vested in trustees and mortgagees, and for enabling courts of equity to give effect to their decrees and orders in certain cases.'"

[See *In re King*, 9 Law J. Rep. (N.S.) Chanc. 257.]

K. BRUCE, V.C. }
Feb. 10. } BARKER v. WALLIS.

Fund in Court—Person of Weak Intellect.

A fund in court belonging to a person of weak intellect, ordered, by consent, to be carried over to his separate account; the dividends to be paid to him until further order, with liberty for him to apply.

The plaintiff in this case, who appeared to be a person of weak intellect, had trans-

ferred a sum standing in his name in the funds, into the joint names of himself and the defendant. The object of the suit was to procure a re-transfer of this sum into the plaintiff's name, and he was held to be entitled to that relief.

The VICE CHANCELLOR observed, that it would be very desirable that the property of the plaintiff should be taken care of for him. This might in some degree be effected, if an order was made, that the fund, instead of being transferred into his name, should remain in court, and be carried over to his separate account, and the dividends be paid to him until further order, with liberty for him to apply. The consequence would be, that the fund could not be got out of court without the intervention of a solicitor, and he would hold that solicitor responsible for any undue and improper dealing with it. Such a decree, however, could only be made with the consent of the plaintiff. The solicitors of the plaintiff not objecting, the decree was made accordingly.

Mr. Lovat, for the plaintiff.

Mr. Montagu, for the defendant.

K. BRUCE, V.C. }
Feb. 14. } MORRICE v. LANGHAM.

This case is reported in 10 *Law J. Rep.* (N.S.) Chanc. 38.

A case was submitted for the opinion of the Court of Exchequer, for the purpose of determining whether Herbert Langham or Langham Christie was entitled to the rents of the estates, until the death, or the birth of issue, of Sir James Langham. The Court of Exchequer, upon the case submitted to them, returned a certificate to the effect, that Langham Christie was entitled. The arguments and judgments are reported in 8 *Mee. & Wels.* 194; s. c. 10 *Law J. Rep.* (N.S.) Exch. 289.

The cause now came on upon this certificate, and *Mr. Romilly*, for Herbert Langham, consenting, a decree was taken confirming the certificate, and declaring in conformity to it.

V.C. }
Jan. 14. } SAMPAYO v. GOULD.

Marriage Articles—Customary Clauses—Investment on Real Securities—Appointment of New Trustees.

Upon exceptions to the Master's report, approving of a proper settlement according to the law of England, with all customary clauses, having regard to certain articles entered into in Portugal,—It was held, that the Master was right in inserting a power for the appointment of new trustees, and a power to invest in real securities, although such powers were not alluded to in the original articles, and although the articles expressly provided for the investment of the money in English and French funds.

This bill was filed for the purpose of having a marriage settlement executed in pursuance of articles made in the month of November 1825, previously to the marriage of Osborne Henry Sampayo and Christina his wife, while residing at Lisbon, in Portugal, both of them being British subjects. The articles declared, that the stipulations respecting the property, which consisted of money in the English funds, and money invested in trade, should be regulated, made binding, and carried into full and complete effect under the laws of England. Certain persons were appointed trustees and attorneys, who were to invest the money forthwith in the English and French funds, and pay the interest to the husband and wife, in manner therein mentioned.

By the decree in the cause, dated the 13th of November 1840, it was referred to the Master to settle and approve of a proper settlement of the trust funds, according to the law of England, with all usual and customary clauses and powers, having regard to the provisions of the contract of marriage in the bill mentioned, and the Master to appoint three proper persons trustees, in the room of the two trustees of the settlement, since deceased, and of the third trustee, who desired to retire from the trusts. In pursuance of this decree, the Master appointed three persons to be trustees, and approved of a proper settlement.

To this report, exceptions were taken, first, that the Master had, in the draft of the settlement, inserted a proviso or power,

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enabling the trustees or trustee of the settlement, for the time being, from time to time to invest the said trust funds and property, or any part thereof, upon real securities in Great Britain or Ireland, at interest, by way of mortgage; and secondly, that the settlement contained a power for the appointment of new trustees.

Mr. Richards and Mr. R. Palmer, in support of the exceptions, contended, that the Master had no power under the decree to insert in the settlement any clauses not warranted by the marriage articles, which contained an express direction, that the money was to be laid out and be continued in English and French funds—*Bayley v. Mansell* (1).

Mr. Bethell and Mr. Addis, in support of the report, contended, that the clauses inserted by the Master were usual and customary, according to the law of England, and therefore ought to be inserted in the settlement.

Hill v. Hill, 6 Sim. 136.

Lindov v. Fleetwood, *ibid.* 152.

THE VICE CHANCELLOR.—In my opinion, the only question is, what is to be considered the true construction of the decree, for the Court is bound by that, until reversed. All usual and customary clauses are to be inserted, having regard to the provisions of the contract of marriage. There can be no doubt, but that these clauses, which the Master has inserted, are usual and customary in English marriage settlements: then, is there anything in the contract to exclude them? As to the clause authorizing the funds to be laid out in securities in England and Wales, it is certainly true, that English and French funds only are pointed out for the trustees to invest the money upon, but I think it evident the parties never could have intended to exclude the usual clause, which is always found to be of the greatest convenience; and then as to the clause for the appointment of new trustees, the power is, in fact, exercised by the appointment now made by the Court of new trustees, in the place of those originally appointed, and I can see no reason why that clause should not be inserted.

Exceptions overruled.

(1) 4 Madd. 226.

R

K. BRUCE, V.C. }
Jan. 31. } BROOKS v. PURTON.

Practice.—Amendment—Common Injunction.

The act of amending a bill does not ipso facto dissolve a common injunction, which has not been expressly saved by the Court, but it may furnish good ground for the defendant to move to dissolve it.

In an action by B. against A, A. paid a sum of money into a court of law, and B. obtained a verdict for that sum. A. then obtained the common injunction against B. B. obtained from the court of law a rule nisi for the payment of this sum to him :—Held, that this was a breach of the injunction by B.

In February 1841, the defendant Purton commenced an action in the Queen's Bench, against the plaintiff Brooks, in respect of a sum of 225*l.* Brooks paid the sum into court. In May 1841, Brooks filed a bill against Purton, praying for an account in respect of the said sum, and for an injunction. This bill was three times amended. In July, Purton obtained a verdict, and shortly afterwards Brooks obtained the common injunction against him. In August, Purton put in his answer. In November, Brooks obtained an order as of course to amend his bill a fourth time, without prejudice to the injunction, and the bill was amended accordingly. In December, this order was discharged by the Master of the Rolls for irregularity. (See *ante*, p. 73.) A few days afterwards, the plaintiff obtained from Vice Chancellor Knight Bruce, an order to amend his bill, with a direction, that the amendments already made should be considered as new amendments made under that order. The plaintiff acted upon this order. No steps were taken by the defendant with reference to the injunction. In January 1842, Purton obtained against Brooks, on application to the Court of Queen's Bench, a rule to shew cause why the said sum of 225*l.*, which had been paid into the Court of Queen's Bench, should not be paid out to him.

The plaintiff Brooks now moved that Purton should stand committed for a breach of the injunction.

The questions on this motion were, first, was the injunction in existence at the time

Purton obtained the rule, or had it been lost by the plaintiff acting under the order of Vice Chancellor Knight Bruce? Secondly, supposing the injunction to exist, was the rule obtained by Purton a breach of the injunction?

Mr. C. P. Cooper and Mr. Romilly, for the motion, cited on the first question, *Ferrand v. Hamer* (1); and on the second,

Bullen v. Ovey, 16 Ves. 141.

Mills v. Cobby, 1 Mer. 3.

Franklyn v. Thomas, 3 Mer. 225.

Mr. Russell and Mr. Chandless, as to the first question, contended, that by the act of amending a bill, the injunction is gone, unless expressly saved by the Court. This was the opinion of Lord Eldon :—

Bliss v. Boscawen, 2 Ves. & Bea. 102.

Turner v. Bazeley, *ibid.* 330.

Sharp v. Ashton, 3 *ibid.* 144.

Mair v. Thelluson, *ibid.* 145, n.

Of Sir John Leach,—

Pratt v. Archer, 1 Sim. & Stu. 433.

Of Sir L. Shadwell,—

Home v. Watson, 2 Sim. 85.

Pickering v. Hanson, *ibid.* 488.

Davies v. Davies, *ibid.* 515.

Woodroffe v. Daniel, 9 Sim. 410; s. c.

8 Law J. Rep. (N.S.) Chanc. 16.

It has been uniformly laid down as the rule in all books of practice :—

Eden on Injunctions, 121.

1 *Smith's Ch. Pr.* 624.

1 *Daniel's Ch. Pr.* 527, 531.

Amendment puts an end to all process of contempt—*Symonds v. the Duchess of Cumberland* (2). They contended, that, great as was the authority of Lord Cottenham, the point did not arise in *Ferrand v. Hamer*, and that what he there said, was only a dictum, which was opposed by the dicta of the Judges above mentioned; that Lord Cottenham had founded his opinion on Mr. Dickens's report to Lord Bathurst, in the year 1777, in *Mason v. Murray* (3), but that Mr. Dickens, in 1792, in *Edwards v. Edwards* (4), had expressed an opinion directly contrary; that Lord Cottenham had

(1) 4 Myl. & Cr. 143, 147; s. c. 8 Law J. Rep. (N.S.) Chanc. 96.

(2) 2 Cox. 411.

(3) 2 Dick. 536.

(4) *Ibid.* 755.

stated, that the dismissal of a bill would not dissolve an injunction, but the contrary would seem to be the rule—*Green v. Pulsford* (5), and that some of the cases above cited had not been cited before Lord Cottenham. On the second question, they cited *Morrice v. Hankey*, 3 P. Wms. 146.

Franco v. Franco, 2 Cox, 420.

KNIGHT BRUCE, V.C.—I shall decide this case without reference to the order of May 1839. The first question is, whether the injunction still subsists. I conceive Lord Cottenham's opinion to be, that the mere fact of amending a bill, though it might furnish ground for dissolving the injunction, does not, *ipso facto*, dissolve it, although there be no insufficient answer, and although it was not granted on the merits. There are expressions of great authorities to be found in the books, from which a different view might be implied; and if I were clearly of opinion that a contrary rule had been laid down, I might feel myself restrained from deciding against it. I am not satisfied that such a rule has been laid down, though the cases are sufficient to shew that the defendant has a right to apply to the Court to have it dissolved. In this case, I am of opinion that the injunction still subsists, though it is open to the defendant to move to dissolve it, on the ground of the amendment having been made. The next question is, whether the proceedings at law amount to a breach of the injunction. I am of opinion, that, upon principle and authority, they amount to a breach.

L.C. }
Feb. 9. } *In re* HARRIET DANIEL.

Lunatic Trustee—Conveyance of Trust Property—Act 1 Will. 4. c. 60.

Where the evidence adduced of unsoundness of mind of a lunatic trustee, but not found such by inquisition, is very strong, the Court will make the order for a conveyance of the trust property in the first instance, without directing a reference to the Master.

Mr. Griffith Richards and Mr. Jeremy applied by petition under the statute 1

(5) 2 Beav. 70.

Will. 4. c. 60, for an order for the conveyance of certain trust estates, the surviving trustee having become a lunatic, though not found such by inquisition. The evidence of unsoundness of mind, adduced in support of the application, was very strong, and—

The LORD CHANCELLOR, on that ground, ordered the conveyance at once to be made by some person to be named by the petitioner, according to the direction contained in the act.

K. BRUCE, V.C. }
Feb. 15. } *SILLICK v. BOOTH.*

Presumption of Death.

A. and B. perished at sea. By the law of England, evidence may be adduced as to their age, health, and strength, for the purpose of drawing a presumption, whether one of them survived the other.

The Master having found that A. had survived B, and no exception having been taken to the report on this ground, whether the question is open on the record, at the hearing on further directions—quære.

A reference was made to the Master to inquire whether two brothers, James and Charles Corbett, who had perished at sea, had survived their father; and whether one, and which of them, had survived the other. The Master found that they had survived their father, and found also, upon the evidence before him, by which it appeared that James was twenty-eight, and a strong man, and Charles about eighteen, and sickly and delicate, that James had survived Charles. An exception was taken to the first finding of the Master, and a report of the case, upon this point, is given *ante*, 41. No exception was taken to the second finding. The case now came on on further directions, and a question having been raised as to which of the two brothers survived the other,—

Mr. Simpkinson argued that, by the law of England, when two or more persons had perished together by a common accident, they would be deemed, in the absence of any evidence to the contrary, to have perished at the same moment. He cited—

General Stanwix's case, *Fearne's Post. Works*, 37.

The King v. Dr. Hay, 1 W. Bl. 640.
Swinburne on Wills, part 7. s. 23.
Wright v. Netherwood, 2 Phil. 266, n.
Hitchcock v. Beardsley, West's Rep.
 temp. Lord Hardwicke, 445.
Brown v. Bradshaw, Prec. Ch. 153.
Mason v. Mason, 1 Mer. 308.
Taylor v. Diplock, 2 Phil. 261.
In the goods of Selwyn, 3 Hag. Ec. Rep.
 748.

Mr. Cooper and Mr. Hare, *contrà*.

Knight Bruce, V.C.—It is not a necessary inference that both died at the same time. By the law of England, evidence as to the age, strength, and health of the parties may be adduced, for the purpose of drawing a presumption whether one survived the other. If the matter were open on the record, I should hold with the Master in this case, that James survived. I do not decide whether it is open on the record or not. If not open, the parties are concluded; if open, I am of the same opinion as the Master.

K. BRUCE, V.C. }
 Feb. 18. } ABBEY v. PETCH.

Solicitor and Client—Account—Verdict at Law.

*A, a solicitor, had various dealings, professionally and otherwise, with B. After the death of A, charges were brought against B. of a sum of 3,000*l.* for money lent to him by A, and another sum for professional business done for him. Evidence was adduced that B. had been in the habit of paying sums on account of interest to A, and that B. had soon after the death of A. distinctly admitted that 3,000*l.* was due from him to A. A verdict at law had been obtained against B. for that sum, on an account stated by the executrix of A, but further proceedings had been stayed by injunction. In a bill by B. against the executrix of A, to open all the accounts between A. and B,—Held, that the sum of 3,000*l.* was a legitimate item against B, and not to be disputed.*

The defendant was the sole executrix of Mr. Petch, a solicitor. The bill stated, that Mr. Petch had been the solicitor of the

plaintiff from 1819, until his death in 1839; that a variety of dealings and transactions had taken place between the plaintiff and Mr. Petch, both in his professional character and otherwise, but that no bills of costs had ever been delivered, or regular settlement of accounts made in Mr. Petch's lifetime; that soon after the death of Mr. Petch, the defendant sent in a charge of 3,000*l.* for money lent to the plaintiff, or due from him, irrespective of professional charges, and a charge of 853*l.* for professional business done for him; that the plaintiff disputed both charges; that he had delivered to Mr. Petch, in his character of solicitor, the title deeds of some property belonging to him, and that the defendant claimed a lien on them. The bill prayed an account of all the dealings and transactions of the plaintiff with Mr. Petch, in his professional character and otherwise, and that the deeds might be delivered up.

The defendant by her answer stated, that as to the 3,000*l.* she could not produce any deed, security, or written acknowledgment of that sum, and that the books and accounts of the testator were in such a confused state, that she could give no regular or connected account of the items composing it. She stated, however, that Mr. Petch had in his last illness said, that 3,000*l.* was due to him from the plaintiff, and that it appeared from some memoranda in the testator's writing, that different sums from 1,000*l.* to 3,000*l.* were due at different times, on account of money lent; and that the plaintiff had made certain admissions, which are set out in the evidence stated in a subsequent part of the case. As to the bills of costs, she stated, that they were justly due, and fair and reasonable.

Mrs. Petch had brought an action against the plaintiff, for 3,000*l.* on an account stated, and obtained a verdict for that sum. The plaintiff, however, paid 3,000*l.* into court in this suit, and obtained an injunction to stop all further proceedings. The evidence on the part of the defendant was as follows:—Mr. Robert Petch, a son of Mr. Petch, stated that he was a solicitor, but that he had never had any dealings whatever with the plaintiff; that after the death of his father, and early in the year 1840, he called on the plaintiff, and told him the 3,000*l.* would be wanted at Lady-day, to which the plaintiff replied

"that is all right," and asked "if the whole or a part only would be wanted;" that he said the whole, and that the plaintiff said it should be ready. The plaintiff then produced an account in his own hand-writing to him, where there were entries: "Mr. Robert Petch, Cr. to Abbey, 1831, October 11, half a year's interest 60*l.*; 1832, April 6, half a year's interest 60*l.*;" and that he afterwards sent the witness a copy of this account. The plaintiff said in this interview, "that he had overpaid his interest last year," and the witness believed, by looking at some account in his father's writing, that as the plaintiff had paid 6*l.* more than 4 per cent., that the rate of interest between the plaintiff and his father was 4 per cent. Some time after witness called again, and asked if plaintiff would be prepared with the money, and he said he should. Some conversation then ensued on the subject of the bills for business, respecting which there was some dispute. A clerk of Mr. Petch spoke as to the very careless and irregular manner that Mr. Petch transacted business, frequently lending money without taking any acknowledgment for it, and also as to admissions by the plaintiff in Mr. Petch's lifetime, that the title-deeds were deposited as a security for money lent; and this clerk and two daughters of Mr. Petch stated several occasions, when the plaintiff had called and paid different sums for what he called "his interest." All these witnesses had been examined on the part of the defendant, Mrs. Petch, in the action, and they were not cross-examined in equity by the plaintiff. It was stated, that the plaintiff had afterwards retracted his admissions.

The cause now came on to be heard.

Mr. Simpkison and *Mr. Bichner*, for the plaintiff, argued, that courts of law were satisfied with much less evidence in support of an account stated, than courts of equity; that this Court looked with great strictness on all dealings between solicitor and client, and principal and agent; and contended that the whole account ought to be opened, and all the items proved. They cited—

Middleditch v. Sharland, 5 Ves. 87.

Detillin v. Gale, 7 Ibid. 583.

Morgan v. Lewes, 4 Dow, 29.

Mr. Purvis and *Mr. J. Parker*, for the defendant, relied on the verdict at law, and

the admissions of the plaintiff. They argued, that the Court would not open settled accounts between solicitor and client, unless there was some taint of fraud or suspicion, of which there was none here. They commented on the cases cited by the plaintiff, and contended, that the circumstances were different in this case.

KNIGHT BRUCE, V.C.—This is a bill for an account, filed by a client, against the personal representatives of a solicitor, with whom he had in his lifetime various pecuniary dealings, independently of his professional business; and, with the exception of a sum of 3,000*l.*, the directions are a matter of course. After directing the usual inquiries his Honour proceeded:—The only question left is as to this 3,000*l.* The blame, if any, arising from the obscurity in which this is involved, does not belong wholly to Mr. Petch; it belongs to him so far as this—it was his duty to have kept regular accounts of all the dealings between him and his client, which it is conceded he did not keep; but the plaintiff has not so strong a ground of complaint as many persons in cases in some degree analogous to this, for he seems to have been a consenting party in this obscurity. I agree with all that has been laid down by the authorities, as to the dealings between solicitor and client, and indeed between principal and agent. These doctrines are in fact conclusive; but they must necessarily yield to circumstances. After the death of Mr. Petch, the plaintiff was called on by the son, who was not professionally concerned with him, and he admits in the most distinct and positive manner, that he was indebted in the sum of 3,000*l.*, and this admission was made at a time when there was no suspicion of professional influence. This evidence does not come upon the plaintiff by surprise, as it was given at law. There is evidence, too, quite unexceptionable, that he was in the habit of paying interest; an account was produced, sent by the plaintiff himself, where 60*l.* is charged in October 1831, and in April 1832, tallying with an account of the conversation between the parties. When to this evidence of conversation is added the verdict for 3,000*l.*, I am of opinion, I ought not, after the death of Petch, to doubt that it was a legitimate item against the plaintiff. The verdict has not

ripened into a judgment, merely in consequence of an order of this Court, but I am entitled to look at the verdict to this effect, that, but for this order there was nothing to have prevented the defendant from ripening it into a judgment. Taking together the conversation, the admissions, and the verdict, I cannot allow it to be a matter of question, whether the defendant was entitled to include the sum of 3,000*l.* as an item. Whether the bills of costs are or are not to be included in it, I leave open. Declare, that in taking the account, the Master is to consider the plaintiff became liable to be debited in the account to the amount of 3,000*l.*, or a sum of greater amount; and that in respect of such amount not exceeding 3,000*l.*, or in respect of 3,000*l.* part thereof, it was agreed, that that part should be debited in account for interest at 4*l.* per cent. Let the costs of Mrs. Petch in the action at law be taxed and paid to her by the plaintiff, and let the sum of 1,200*l.*, part of the sum in court, be paid out to her, without prejudice. Continue the injunction, and reserve further directions and costs in equity.

K. BRUCE, V.C. }
Feb. 10. } WARDLE v. HARGREAVES.

Appointment of New Trustees—Want of Parties.

In a suit for the appointment of new trustees, where the trust fund was settled to A. for life, with remainder to the persons who might be his next-of-kin at his death, the persons who would be his next-of-kin, if he were then dead, are necessary parties.

The object of the suit was to obtain the appointment of new trustees. A fund had been vested in trustees, of whom the defendant was the survivor, upon trust for the plaintiff for life, with remainder to the persons who might be his next-of-kin at his death. The only parties to the bill were the tenant for life and the trustee. The defendant did not raise any objection; but—

Knight Bruce, V.C. said, the suit was defective for want of parties. He had always understood the rule to be, that to such a suit the persons, who would be the next-of-kin of the party if he were then dead, ought to

be parties. The cause to stand over, with liberty to the plaintiff to amend, as he shall be advised.

Mr. Harwood, for the plaintiff.
Mr. Greene, for the defendant.

L.C. }
Feb. 12, 16. } TURNER v. DORGAN.

Creditors' Suit—Payment of Costs of Plaintiff at Law—Injunction restraining Proceedings at Law after Decree.

Where plaintiff, a creditor of testator, is proceeding at law for recovery of his debt, after a decree obtained in a creditors' suit in this court, the order restraining the proceedings ought to direct payment of the creditor's costs of the proceedings at law, up to the time of notice of the decree, where there are assets in court sufficient to pay the same.

An injunction had been obtained in a creditors' suit, against one of the creditors prosecuting proceedings in an action at law, against the executors, for the recovery of a debt due from the testator's estate.

The order, as drawn up by the registrar, directed payment, by the plaintiffs, of the creditor's costs of the proceedings at law, up to the time the plaintiff at law had notice of the decree in the creditors' suit.

An application had been made by Mr. Glasse to the Vice Chancellor of England, for an order directing the minutes to be varied, by striking out that part which directed payment by the plaintiffs of the creditor's costs at law, on the ground, of the plaintiffs having no assets wherewith to pay such costs; when his Honour, supported in his opinion by the registrar then in court, stated that he considered the order correctly framed, and consistent with the modern practice.

The matter having been mentioned to the Lord Chancellor by Mr. Glasse, who referred to the opinion expressed by Lord Eldon in *Drewry v. Thacker* (1), and to *Seton on Decrees*, pp. 302 and 304,—

HIS LORDSHIP said, he considered the order, as drawn up, was correct, and that

orders to the like effect had been constantly acted on, where there were assets in court, but that if an affidavit could be produced, stating it, as a fact, that there were no assets wherewith to pay the costs of the plaintiff at law, the Court might then relieve the plaintiffs from such payment.

L.C. }
Feb. 16, 26. } *Ex parte SMITH re STYAN.*

Bankruptcy—Policy of Assurance—Notice—Order and Disposition—Assignment—Statute 2 & 3 Vict. c. 29.

A, for the purpose of securing a debt due to B, assigned to B. some years before A's bankruptcy, two policies of assurance, and after an act of bankruptcy had been committed by A, B, without notice thereof, and before the date and issuing of the fiat against A, gave notice to the assurers of the assignment:—Held, that the transaction was valid under the statute 2 & 3 Vict. c. 29, and that the policies could not be considered to be in the bankrupt's order and disposition at the date of the fiat issued against him.

For the report of this case, before the Court of Review, vide 10 *Law J. Rep.* (N.S.) Bankr. 79.

The assignees of the bankrupt having brought the subject before the Lord Chancellor, by way of special case,—

Mr. G. Richards and *Mr. Stinton*, for the assignees, contended, first, that the transaction did not come within the meaning of the statute 2 & 3 Vict. c. 29, inasmuch as the bankrupt had no concern, and did not interfere in any manner, in the giving to the assurers notice of the assignment of the policies; and secondly, that according to the case of *Williams v. Thorp* (1), and other authorities, the policies remained in the order and disposition of the bankrupt, and passed to his assignees, in case the Court should be of opinion, that the notice of the assignment given after the act of bankruptcy had been committed, was not a good notice.

Mr. Swanston and *Mr. Bacon*, contra.

The other cases cited in the course of the argument, were—

Ryall v. Rowles, 1 Ves. sen. 348; s. c. 1 Atk. 165.

Jones v. Gibbons, 9 Ves. 407.

(1) 2 Sim. 257.

Ex parte Monro, Buck. 300.

Ex parte Burton, 1 Gl. & Jam. 207.

Ex parte Usborne, ibid. 358.

Williams v. Thorp, 2 Sim. 257.

Ex parte Colvill, Mont. 110; s. c. 9 Law J. Rep. Chanc. 56.

Ex parte Tennyson, Mont. & Bl. 67.

Dearle v. Hall, 3 Russ. 1; s. c. 2 Law J. Rep. Chanc. 62.

Loveridge v. Cooper, ibid. 30; s. c. 2 Law J. Rep. Chanc. 75.

Smith v. Smith, 2 Cr. & M. 232; s. c. (as *Smith v. Masterman*) 3 Law J. Rep. (N.S.) Exch. 42.

Bozon v. Bolland, cited in Mont. & Bl. 74.

Meux v. Bell, 1 Hare, 83; s. c. ante, 77.

Bozon v. Bolland, 1 Russ. & Myl. 69.

Falkener v. Case, 1 Bro. C.C. 125; s. c. 2 Term Rep. 491.

Ex parte Waitman, 2 Mont. & Ayr. 364.

Duncan v. Chamberlayne, 10 Law J. Rep. (N.S.) Chanc. 307.

The LORD CHANCELLOR, after stating the facts of the case, and the questions that had been argued at the bar, proceeded as follows:—I give no opinion on the first two questions that were raised, or on the authorities cited with reference thereto, inasmuch as the case before me falls within the provisions of the act of parliament, 2 & 3 Vict. c. 29, by which it is enacted—[Here his Lordship read the enacting part of that act, rendering contracts *bond fide* made with any bankrupt previous to the date and issuing of the fiat, valid, if no notice had been received of a prior act of bankruptcy]. All *bond fide* dealings, therefore, with a bankrupt, previously to the date of the fiat, and without notice of a prior act of bankruptcy, are valid; and the dealings with the bankrupt in this case, consisted in taking from the bankrupt an assignment of two policies of assurance, by way of pledge for a debt due to the petitioner, and in the petitioner giving notice previously to the issuing of the fiat to the assurers, of the assignment by the bankrupt of those policies of assurance. Now, the whole of this transaction was completed before the date of the fiat, and was of a *bond fide* character, the assignees of the bankrupt not pretending that the petitioners had any notice of a prior act of bankruptcy. The case, as it appears to me, falls distinctly

within the statute of 2 & 3 Vict. c. 29. Supposing the assignment to have been made *bond fide*, and immediately after the act of bankruptcy, and without notice, could it be doubted that that was a good and valid transaction? What difference then is there in the case, where the assignment of the policies is made a long time prior to the act of bankruptcy? It appears to me quite sufficient that the whole transaction between the bankrupt and the petitioners was *bond fide*, and took place before the issuing of the fiat, and without notice of an act of bankruptcy. The order of the Court of Review must, therefore, be affirmed.

K. BRUCE, V.C. }
Feb. 26. } FYLER v. FYLER.

Eastern Counties Railway Act—Liability of the Estate of a deceased Shareholder to pay Calls.

The estate of a deceased holder of shares in the Eastern Counties Railway Company, is liable to pay all the calls made on his shares; whether made before or after his decease.

This was a suit for the administration of the estate of a testator. The testator had originally taken thirty shares in the Eastern Counties Railway Company, and had been duly registered a shareholder. Three calls on these shares had been made in his lifetime, and seven after his death, but nothing had been paid on them.

The company claimed in the Master's office the amount of the calls on these shares against the testator's estate. The Master allowed the claim as to the calls made in the lifetime of the testator, but disallowed it as to the calls made after his decease.

The company excepted to the report, on the ground, that the Master ought to have allowed the whole claim; and the executors excepted, on the ground, that he ought to have disallowed it altogether.

The sections of the act (6 & 7 Will. 4. c. cvi.) bearing upon the question, are the 3rd, 4th, 153rd, 157th, 159th, 160th, 161st, 162nd, 164th, and the 166th, of which the most material are the 4th, the 160th, and the 162nd. By the 4th, it is provided, that if any proprietor should neglect to pay the calls, it should be lawful for the company

to sue for and recover the same in any court of law or equity. By the 160th, it is provided, that if any proprietor should so neglect, it should be lawful for the company to sue in any court of record by action or suit, or the company might declare the shares to be forfeited. The 162nd section specifies what evidence shall be sufficient for the company in an action at law against a "proprietor" for the calls; but does not notice his executors.

Mr. Wigram and Mr. Bruce, for the company.

Mr. Koe and Mr. Hall, for the executors; and—

Mr. Russell and Mr. R. W. E. Forster, for persons interested under the will, contended, that the liability to pay the calls ceased with the life of the proprietor, and that the proper course for the company was to declare the shares to be forfeited. They relied on the terms of the 162nd section. They also insisted on the hardship of making the executors personally liable to pay the amount of such calls.

KNIGHT BRUCE, V.C.—The question is, not whether the executors are personally liable, but whether the testator's estate has been discharged from liability in respect of these shares. The testator was a registered owner of certain shares, and in that character became liable to pay all the calls on those shares. Since his death these shares have been standing in his name, and, I think, that as between himself and his brother adventurers, his estate cannot be freed from liability in respect of them. The only argument on the other side, rests on this—that by a particular clause an indulgence is granted to the Court of suing under particular circumstances with particular forms, and that such forms, not being applicable to an executor, he cannot be sued at all. If that clause had been out of the act, the executors would have been liable without any doubt; and the mere giving the company an indulgence does not create a doubt. I am of opinion, that the testator's estate is liable both for calls before and after his death, with interest, and the exceptions must be dealt with accordingly.

Note.—This case has been reported on the ground, that probably the decision in this case is applicable to many other railway and similar acts.

M.R. }
Jan. 12, 13. } THORP v. OWEN.

Gift—Declaration of Trust.

A, the son and sole executor of B, who, by her will, bequeaths all her personal estate and effects amongst her six grand-daughters, (the daughters of A,) payable at twenty-one, with benefit of survivorship, after B's death, invests in his name, as executor of B, the produce of B's estate, in 3½l. per cent. reduced bank annuities. A then draws out a statement of account as between himself and B's estate, and sends it to his solicitors, in which he inserts the sum of 1,000l. cash, as added by him to the estate of B. A afterwards invests the 1,000l. in his name in the same stock in which he had previously invested the produce of B's estate. A, during his lifetime, treats the stock, the produce of the 1,000l., as part of B's estate, and in a letter to his solicitors, states that the same was a voluntary gift on his part. He also paid the two eldest daughters, who attained twenty-one during his lifetime, their proportional shares of B's estate, including the like shares of the stock, the produce of the 1,000l. cash:—Held, that the transaction amounted to a declaration of trust of the stock arising from the investment of the 1,000l. cash, in favour of the six grand-daughters of B, and payable amongst them in the same manner as the testatrix's estate.

The bill in this case was filed, to carry into effect the trusts of the will of Henry Owen, who died on the 26th of June 1841, leaving eleven children, five sons and six daughters, surviving him, who claimed to be interested, in equal shares, in the estate and effects of the said Henry Owen, by virtue of his will. Mary Owen, his widow, became his legal personal representative. Henry Owen's estate was subject to a claim made by the legatees, claiming under the will of Mira Joan Owen, widow, who died in February 1827, and by her will, dated the 15th of January 1827, appointed Henry Owen her sole executor, and gave to him all her personal estate, upon trust to pay and divide the same equally between her six grand-daughters, Eleanor Mary, Mira Louisa, Mary Sibella, Jacintha Octavia, Agatha Emilia, and Adeline

Matilda, the daughters of Henry Owen, upon trust, as they should severally attain their ages of twenty-one, with benefit of survivorship between them. The clear residue of Mira Joan Owen's estate consisted of a sum of 315l. new 4l. per cent. bank annuities, 700l. 3½l. reduced bank annuities, and 312l. 1s. 10d. cash, and the two sums of stock were sold by Henry Owen, and the produce thereof, together with the sum of 312l. 1s. 10d. cash, was invested in his own name, in 3½l. per cent. reduced bank annuities. To that, Henry Owen added like stock, the produce of 1,000l. cash, purchased by him. In 1830, and after Eleanor Mary had attained twenty-one years of age, Henry Owen transferred into her name, one-sixth part or share of the aggregate stock, together with the like share of accumulations thereon, up to that time; and in the year 1834, after Mira Louisa had attained twenty-one years of age, Henry Owen transferred into her name one-fifth part of the residue of the said stock, together with the like share of the accumulations of dividends thereon, up to that time. In 1838, Mary Sibella married Henry Hopetown Sadler, and attained the age of twenty-one years on the 30th of March 1839; and by an indenture of settlement, dated the 1st of May 1838, Henry H. Sadler covenanted to settle the contingent share of Mary Sibella, his wife, in the legacy given by the testatrix's will, upon the trusts therein mentioned: on the 23rd of April 1841, an indenture of release and indemnity was, by the instructions of Henry Owen, prepared, and the same was between H. Owen and James H. C. Sadler, the trustees under the settlement, of the first part, H. H. Sadler and Mary Sibella, his wife, of the second part, and Henry Owen, as the executor of M. Joan Owen, of the third part, and it purported to release and indemnify Henry Owen, in respect of his transferring into the trustees' names the sum of 637l. 10s., 3½l. per cent. reduced bank annuities, and the payment to Mary Sibella Sadler of the dividends accrued on that sum since the 30th of March 1839; but the transfer of 637l. 10s., 3½l. per cent. reduced bank annuities, was not made, because J. H. C. Sadler had not executed the indenture of release and indemnity before the death of Henry Owen, and the sum

of 637*l.* 10*s.*, 3½*l.* per cent. reduced bank annuities, formed part of the sum of 2,550*l.* 3½*l.* per cent. reduced bank annuities, standing in the name of Henry Owen at the time of his death.

Jacintha Octavia Owen having attained her age of twenty-one years on the 21st of January 1841, she claimed a like interest to that claimed by the trustees under the last-mentioned settlement, in the sum of 2,550*l.* 3½*l.* per cent. reduced bank annuities, which was, by an order of the Court, carried to the account in the cause of "the legatees under the will of M. J. Owen, deceased."

It appeared, that on the 20th of July 1840, Henry Owen was applied to by the solicitors of H. H. Sadler and Mary Sibella, his wife, and J. H. C. Sadler, for an account of the estate of M. J. Owen, and on the 20th of that month, he sent to Messrs. Grane & Son, his solicitors, for delivery to the solicitors of H. H. Sadler and wife, and J. H. C. Sadler, a statement of account of some length, on one side of a letter, both of which were in his handwriting: the letter was as follows:—"Gentlemen, on the other side is the statement. I do not believe Mr. J. Sadler calls for the account. It is merely an excuse to run Hopetown Sadler a bill. I shall be happy to pay to Mr. Sadler and his wife the three half-years' dividends, and to assign over to the trustees the 637*l.* 10*s.*, when a due order is received by me from them. I cannot think of becoming a trustee for a person who hath a better opinion of his attorney than of me. I regret, for the young people's sake, their conduct. In fact, I shall be glad to have done with the present litigants. Yours truly, H. Owen. —Messrs. Grane & Son, solicitors, Bedford Row, London."

The second entry in the statement of accounts on the debtor side, was in the following words and figures, viz. "1827, March 27, added 1,000*l.*" Other entries on the debtor side were as follows:—"Due to H. and M. Sadler, or to their trustees, one-fourth of 2,550*l.* (637*l.* 10*s.*) 3½*l.* stock. Due to H. and M. Sadler, three half-years' dividends on 637*l.* 10*s.* 1830, Nov. 28. Sale 500*l.* stock at 91*l.* = 445*l.*"

On the creditor side of the statement of account, were the following (amongst other) entries:—

1830, May	£.	s.	d.	£.	s.	d.	
½ stock	2,550	0	0	=	432	5	0
½ stock balance of	87	1	5	=	13	10	6
To E. M. Owen.					445	15	6

1832, Jan.	£.	s.	d.	£.	s.	d.	
By ½ balance of	36	1	2	=	7	4	10
M. L. Owen.							

On the 28th of July 1840, Messrs. Grane & Son wrote and sent to Henry Owen the letter next hereinafter set forth, and on the 3rd of August 1840, received the same back from the said Henry Owen, with answers to the questions in the same letter written by him thereon, of which the following are copies, viz. "23, Bedford Row, 28th of July 1840.—Dear Sir, We are sorry to trouble you again on this matter, but you mention in yours, received this morning, that the 1,000*l.* mentioned in your account, was your own money; now, if so, we think that (Q. 1,) it should altogether be kept out of the account now to be handed to Quilter & Taylor, (the solicitors of Mr. and Mrs. Sadler,) though you might, if you pleased, pay over to Mrs. Sadler's trustees any larger sum than that which should appear strictly due from you. Q. 2, Was the 1,000*l.* a voluntary gift on your part, without any legal obligation or debt? Q. 3, If so, we suppose this mode of giving a portion to your daughters, was adopted as a convenience to yourself, since you would have the trouble of managing the fund of which you were trustee? Will you be good enough to explain this to us, as it may enable us to save you considerable trouble. Q. 4, When were the six dividends (from 1834 to 1839) of 73*l.* 10*s.* each, laid out in stock? What 'duty' was it, which amounted to 14*l.* 2*s.* 1*d.*, mentioned by you? We are, dear Sir, yours faithfully, Grane & Son. Henry Owen, Esq."—"Q. 1, As I have hitherto made the 1,000*l.* part of the testator's property, I cannot now alter it. Q. 2, Yes. Q. 3, Yes. Q. 4, Not yet laid out, owing to the delinquency of my daughters; I have only invested the dividends from one daughter's majority to another. I forgot to say, I make my account as the bankers do theirs, the receipts on the left hand side of the book facing the reader, the payments on the right."

From the above statement of account, the solicitors of Henry Owen drew out an

account in writing, a copy whereof was delivered to the solicitors of Henry Hopetown Sadler and wife.

Upon the testator, Henry Owen, paying to Eleanor Mary Owen, afterwards E. M. Sadler, the produce of one-sixth share of the aggregate fund formed by the estate of M. J. Owen, and the 1,000*l.* added by the said testator, he required her to sign, and she did accordingly sign, a receipt, which was drawn up by the said testator, in his own handwriting, and was as follows:—"Received November 26, 1830, of Mr. Henry Owen, the sum of 448*l.* 15*s.* 6*d.*, being one-sixth part of the estate of M. J. Owen, deceased, including the dividends up to the 1st of October 1830, as also the addition made by Henry Owen, amounting in the whole as above." Upon the testator paying to Mira Louisa Thorp and Thomas Thorp, the produce of one-fifth share of the aggregate fund, formed as aforesaid, the testator required those parties to sign, and they accordingly signed, a receipt, which was as follows, and drawn up in the testator's own handwriting, viz.—"Received November 17, 1834, of Mr. Owen, the representative of M. J. Owen, deceased, 557*l.* 0*s.* 4*d.*, viz. 513*l.* 7*s.* 6*d.*, being one-fifth part of the personal estate of Mira Joan Owen, deceased, at January 1833, and this day realized; 7*l.* 4*s.* 10*d.*, being one-fifth balance of the executor's account at that time, together with 36*l.* 8*s.*, being four half-years' dividends to this time, on the said one-fifth share of the personal estate of M. J. Owen, due to M. L. Thorp and Thomas Thorp, under the will of the aforesaid M. J. Owen."

£.	s.	d.
513	7	6
7	4	10
36	8	0
<hr/>		
557	0	4

On the 12th of November 1840, the testator wrote and sent to his solicitors a letter, inclosed wherein was one-half of a cheque upon his bankers, for the sum of 44*l.* 12*s.* 6*d.*, the whole of which letter was in the handwriting of the testator, and the material part whereof was as follows:—"Gentlemen, Mr. H. H. Sadler's trustees being entitled to one-fourth of 2,550*l.* 3*¼**l.* per cent. annuities, or thereabouts, (errors excepted,)

on the 30th of March 1839, he and his wife are entitled, under their joint receipt, to the four half-years' dividends of the said quarter share, viz. on 637*l.* 10*s.* stock, which amounts to 44*l.* 12*s.* 6*d.*, half of which order for payment I have inclosed." The testator shortly afterwards sent up the other half of the cheque, and on the 25th of November 1840, the sum of 44*l.* 12*s.* 6*d.* was paid by the testator's solicitors to the said M. S. Sadler, with the approbation of her husband.

The Master's report of debts having been absolutely confirmed, a petition was presented on the part of Mary Owen, widow, the personal representative of Henry Owen, and Mary Sibella Sadler and Jacintha Octavia Owen, and the two infant legatees, embodying the circumstances hereinbefore stated, which in some particulars are not quite clear, and praying a declaration as to the rights of the parties in the stock, the produce of the 1,000*l.* cash.

Mr. Kindersley and *Mr. Stinton*, for the petitioners, Mary Sibella Sadler, Jacintha Octavia Owen, and for the infant plaintiffs and legatees, Agatha Emilia Owen and Adeline Matilda Owen, contended, that the 1,000*l.* invested by the testator, Henry Owen, in his name, in stock, must be considered as if it had been a part of the testatrix's estate, the testator during his lifetime having done all he could to carry over the funds consistently with the bequest contained in the testatrix's will, which gave a claim by survivorship to children attaining twenty-one, to the shares of such of the children as should die under that age.

Mr. Tinney and *Mr. O. Anderdon*, for the five sons interested in the estate of the testator, Henry Owen, contended, that there was no sufficient declaration of trust by the testator to stamp the stock, the produce of the 1,000*l.*, as part of the testatrix's estate, or as given to his daughters; that there was no effectual gift proved of the money in question; that to make the gift complete, everything ought to have been done that could have been accomplished by the testator during his lifetime; and that the Court would not assist a party who had no legal claim, and was a mere volunteer in obtaining possession of the fund.

Cotteen v. Missing, 1 Madd. 176.
Ex parte Dubost, 18 Ves. 140.
Antrobus v. Smith, 12 Ibid. 39.
Gaskell v. Gaskell, 2 You. & Jer. 502.
Ward v. Audland, 8 Sim. 571.

Mr. Collins, for a party in the same interest as the sons of the testator, cited—

Edwards v. Jones, 1 Myl. & Cr. 226;
 s. c. 5 Law J. Rep. (N.S.) Chanc. 194.
Jefferys v. Jefferys, 1 Cr. & Ph. 138.

Jan. 12.—HIS LORDSHIP stated, that the gift of the testator was not completed during his lifetime, but that if the statement of accounts was to be believed, he had certainly made the 1,000*l.* a part of the testatrix's estate, the testatrix dying in February 1837, and the testator's accounts commencing in March 1837, when he added the sum of 1,000*l.*, and afterwards invested it in stock which was transferred into his name, he being the sole executor of the testatrix.

HIS LORDSHIP having ordered the petition to stand over, for the production of any further evidence that could be found, having relation to the subject-matter in discussion, on the 13th of January a letter was produced, dated the 23rd of July 1840, which had been written and sent by Messrs. Grane & Son to the said Henry Owen, and which contained his replies to such letter, but they threw no further light on the subject, whereupon his Lordship, after adverting to the entries made in the testator's statement of accounts, the conversion of the stock belonging to the testatrix's estate into the same stock as that in which he had invested the sum of 1,000*l.* cash, belonging to himself, and the testator's subsequent accounts, expressed his opinion, that although there was not in the case before him a complete gift of the stock, the produce of the sum of 1,000*l.* cash, there was what amounted to a declaration of trust; and his Lordship accordingly directed that the executors should dispose of what remained of the stock, the produce of the sum of 1,000*l.* cash, in the same way in which the testatrix's funds were to be disposed of, and ordered that the costs should be paid out of the estate of the testatrix.

WIGRAM, V.C. }
 Nov. 18, 19, 24; } BOWSER & COLBY.
 Dec. 8, 11.

Forfeiture of Lease—Non-payment of Rent—Relief—Payment into Court—Proviso for Re-entry—Issue—Insolvency—Conduct—Equitable Assignment—Proof vivâ voce.

A lessee, on filing his bill for relief against a forfeiture at law, by non-payment of rent, is not compelled, by the 4 Geo. 2. c. 28, to bring into court the arrears and costs within forty days after answer, if the lessor is in possession, and the tenant asks no relief till the hearing.

The Court has jurisdiction to give relief equally, whether the lease contains a mere power of re-entry on non-payment of rent, or a declaration that, in that case, the lease shall be absolutely void.

The defendants, the lessors, are at liberty to shew other breaches of covenant; and, semble, if any such are well proved in the cause, relief will be refused, without directing an issue to try the fact.

In directing such an issue, the Court will not, generally, order the arrears and costs into court before the trial; but, under the circumstances, it was ordered, the plaintiffs being the executors of the deceased lessee, and there being strong evidence to shew the insolvency of his estate.

The plaintiff failing in his suit, the money brought into court will be ordered to be repaid to him.

The Court will look at the acts and conduct of a lessee coming to redeem in analogy to the case of a person coming for the specific performance of an agreement for a lease.

A deed of assignment without licence, not set out in the answer, was proved vivâ voce at the hearing:—Held not sufficiently proved for the Court to act upon it.

Equitable assignments not sufficient to avoid the lease at law, are not a ground for refusing relief.

By an indenture of lease, of the 19th of September 1807, Sir H. Owen demised to G. Bowser the elder, his executors and administrators, all and every the veins and seams of coal, &c., being under certain lands therein mentioned, situate in Pembrey, in

the county of Carmarthen, to hold the same from Michaelmas then next ensuing, for the term of fifty years, yielding and paying to Sir H. Owen one clear sixth part of all the monies made by the sale of the coal, &c., without any deductions, every half year; and in case the said one-sixth part should not amount in any one year to 100*l.*, then the clear yearly sum of 100*l.* And it was therein provided, that at the end of every third year of the said term, from the 29th of September 1809, an account should be taken of all the coal raised or sold by G. Bowser the elder, his executors, &c., within the next preceding three years; and if, upon the taking of such account, it should appear that in any one or more of the said three years, such quantity of coal, &c. had been raised and sold, as that the one-sixth part amounted to more than 100*l.*, and that, in any other or others of the same three years, a less quantity had been raised and sold than was sufficient to produce 100*l.* as such one-sixth part, then the overplus of such money should be added to the lesser sum, &c. And the said George Bowser the elder therein covenanted to pay the rents reserved, and that he would regularly and truly enter in a book, to be kept for that purpose, the quantities of coal, &c. raised and sold, and of the monies received therefrom; and also, at the end of every six months of the said term, would deliver to Sir H. Owen, his heirs, &c. a full and true account of the coal raised and sold during the preceding six months, and of the monies received therefrom; and that Sir H. Owen, his heirs, &c. should have liberty to inspect such book; and also that he, G. Bowser the elder, his executors, &c. would not, during the said term, demise, assign, or set over the mines, &c. thereby demised, or any part thereof, or the liberties thereby granted, or any of them, without the licence or consent in writing of Sir H. Owen, his heirs, &c., or his or their agent or agents. And it was therein provided, that if G. Bowser the elder, his executors, &c. should make default in payment of the rent, within fourteen days after the same became due, being lawfully demanded, or should make default in performing all or any of the covenants, &c., or if the said G. Bowser the elder, his executors, &c., should become insolvent, &c., or the said term thereby granted, or

any part thereof, should be sold or assigned to any person or persons under a writ of execution of any judgment or judgments against him or them, that thenceforth, in all and every of the said cases, it should be lawful for Sir H. Owen, his heirs, &c., to enter upon the said premises, or any part thereof, or upon such works, railways, or canals as might be made, or any part thereof in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy, as in his or their first and former estate, and the said G. Bowser the elder, his executors, &c., and all other occupiers thereof, utterly to expel and amove; and that this lease, as to the term thereby granted, should in that case be forfeited, and the same term should cease, determine, and be utterly null and void, as if the same had never been made and created.

Upon the execution of the said lease, G. Bowser the elder entered into possession of the mines, &c., and worked the same. On the 29th of March 1835, G. Bowser the elder died, leaving his widow, Mary Ann Bowser, and his three sons, George, Samuel, and Robert, him surviving. And by his will, dated the 30th of May 1834, he appointed his widow, Mrs. Bowser, and George Bowser, his son, (the plaintiffs in this suit,) and A. Meredith (one of the defendants), executrix and executors of his said will.

Sir H. Owen died in 1809, having, by his will, dated the 2nd of August in that year, devised all his estates to John Colby the elder, in fee. John Colby the elder died in 1823; and the defendants, Mrs. Colby, T. F. Colby, and C. Matthias, as devisees in trust under his will, and John Colby the younger, as entitled to the fee, represented the interest of Sir H. Owen, the original lessor.

Upon the death of G. Bowser the elder, G. Bowser, the son, and Samuel Bowser, entered into possession of the said mines, for the purpose of paying and satisfying a large sum of money which they had advanced, out of monies settled upon Mrs. Bowser, to said G. Bowser the elder, in his lifetime, to enable him to pay the rent of the said mines, &c. The management and working of the said mines, from the death of G. Bowser the elder, were conducted by Samuel Bowser alone.

In May 1834, the will of George Bowser

the elder was duly proved by Meredith alone; and shortly afterwards the trustees under the will of John Colby the elder, brought an action against Meredith to recover the arrears of rent due from George Bowser the elder; to which action Meredith pleaded *plene administravit*; and thereupon the said trustees commenced an action of ejectment against the plaintiffs G. Bowser and Samuel Bowser, for the purpose of recovering possession of the said mines, under the proviso for re-entry, but without having previously distrained on the said premises; and notices of declaration in the said action were served upon the said G. and Samuel Bowser. The bill then stated, that Samuel Bowser immediately thereupon proceeded to London for the purpose of effecting some arrangement, with respect to the said action of ejectment, with the solicitors of the trustees; and that it was ultimately agreed between them, that the judgment in the said action should be suffered to go by default; and that the said solicitors should take cognovits from the said G. Bowser and Samuel Bowser, at several months' date, for the arrears of the said rent; and that no further proceedings should be had till the defendant, John Colby the younger, should come of age. That judgment by default, in the said action, was signed in Hilary term, 1836; that the trustees revived the said judgment in Michaelmas term, 1837, and caused a writ of possession to be issued, and execution to be executed thereon, on the 23rd of December following, and thereupon the trustees obtained possession of the mines; and they and John Colby, who had since attained his full age, were now in possession, and had made large profits of the said mines; that after possession had been so taken, Robert Bowser, acting on behalf of the plaintiffs, had an interview with the solicitors of the trustees, who then undertook, on behalf of the trustees and John Colby the younger, upon the plaintiffs proving the will of George Bowser the elder, to accept the arrears of rent due from G. Bowser the elder, and give up possession of the mines to the plaintiffs; that the said will was accordingly proved, and 761*l.* tendered to the solicitors of the trustees as such arrears of rent, and refused; that Meredith refused to join with the plaintiffs in this suit; that plaintiffs were advised

that they and the defendant Meredith, as representatives of G. Bowser the elder, were entitled, under the provisions of the 4 Geo. 2, c. 28, to obtain possession of the mines, making such payments as are required thereby; that plaintiffs had requested the said trustees and John Colby to come to an account of the profits of the mines since the 23rd of December 1837, plaintiffs offering to pay what might be due from them to the said defendants; but that the said defendants refused, pretending that they were entitled to keep possession. The bill then charged, that the possession, so as aforesaid taken by the trustees, was contrary to good faith; and that they ought to set forth an account of all profits made by them since the 23rd of December 1837, and an account of all sums of money claimed by them in respect of the arrears of rent from the estate of George Bowser the elder. The bill then prayed, that an account might be taken of what was due to the trustees and John Colby, in respect of the said mines, and of the profits made by the said defendants since December 1837, the plaintiffs offering to pay what should be found due upon the taking of such account; and that the said defendants might be decreed to deliver up possession of the said mines to the plaintiffs and Meredith; and that the said trustees and John Colby might be restrained by injunction from proceeding in the said action of ejectment. The answer of the defendants Mrs. Colby, T. F. Colby, and John Colby alleged, that two parts of the lease of 1807 were executed, and that one of them was formerly in the power of the plaintiffs, but that it was now in the possession of George Barker, of Gray's Inn, with whom it was deposited by G. Bowser the elder; and that the said G. Barker claimed a charge or lien thereon, by virtue of such deposit. That for thirteen years following 1812, G. Bowser the elder never paid any rent for the said mines to the parties entitled, till an action was commenced against him in 1825; that when the said action was on the point of being tried, G. Bowser the elder gave to the trustees the cognovit of himself and his son, for 1,300*l.*, payable by three instalments, being the amount of thirteen years' rent. That the sleeping rent of 100*l.* for 1826 and the four succeeding years was very irregularly paid, and that

20*l.* only was paid by him for the year 1831, and that no rent had ever been paid since. That, to the belief of the defendants, the said George Bowser the elder did not make regular returns or deliver regular accounts of the coal, &c. obtained from the said mines, nor of the monies produced by the sale thereof, and that there were no such returns from 1825 to 1830; that the affairs of the said George Bowser the elder were ascertained to be in a very embarrassed state, and that, in the belief of the defendants, he was, in fact, insolvent, and that there was no prospect that the rent reserved by the lease would in future be regularly paid, or the covenants duly performed; that, in September 1835, application was made to Meredith for payment of the arrears, and that he gave, as an excuse for non-payment, that G. Bowser (the plaintiff) and Samuel Bowser had obtained possession of the said mines, as claimants under a mortgage made to them by their late father; that, in a bill of revivor and supplement filed against Meredith in the suit of *Pitt v. Bonner*, which had been instituted against G. Bowser the elder in his lifetime, Meredith stated, that he believed that the personal estate of his testator would not be nearly sufficient for the payment of his debts; and that Meredith, on proving the will of his testator, swore the personal estate under 100*l.*; and that, from a letter of the 14th of October 1835, addressed to G. Jenkins, the receiver of the estate of the Colbys, George Bowser and Samuel Bowser claimed to be in possession of the premises, as mortgagees for 6,000*l.*, and that it appeared that there was then no sufficient distress on the premises to answer the then arrears of rent, amounting to 480*l.* That the trustees did not sooner issue execution on the judgment in ejectment, because they were informed that there was no entrance to the said mines from lands belonging to the trustees, and that consequently they proceeded no further, till John Colby the younger came of age, in February 1837, and that, in the meantime, George and Samuel Bowser worked the mines more actively and extensively than before, without paying any rent. That John Colby the younger, in the summer of 1837, visited the said mine, in company with a mineral agent, and discovered for the first time that the mines could be entered

by means of a shaft from his own estate, and shortly afterwards the judgment was revived, and the writ of possession was executed on the 23rd of December 1837. That it appeared, from a search in the Prerogative Court of the Archbishop of Canterbury, that the will of George Bowser the elder was proved by the plaintiffs on the 27th of January 1838, when the personal estate of the testator was sworn under 100*l.* That the defendants had been informed, and believed, that the insolvency of the said George Bowser the elder, and of his estate up to the time of his death, not only appeared from the circumstances above stated, but had been admitted by the said Samuel Bowser. That in the action of ejectment the defendants were advised to avail themselves of the statute enabling landlords to recover possession of demised premises, without demanding the rent where it was more than half a year in arrear; and that inspection was had of the premises, and it was ascertained that there was no sufficient distress to answer the sum of 480*l.*, being the arrears then due. They admitted the interview of Samuel Bowser with their solicitors in February 1836, and that some offers were made, but denied that there was any agreement to stay the proceedings in the action till John Colby came of age, but only for such time as their solicitor should be able to consult with the trustees, and that the trustees eventually declined to grant a new lease; that no such promise was made to grant a new lease after the possession was recovered, and that they believed that the lease had been forfeited by breaches of the covenants other than for non-payment of rent, and they charged various assignments of the premises without licence.

The plaintiffs went into no evidence.

The evidence of the defendants went to shew the insolvent state of G. Bowser the elder, and that, in 1833, he executed a deed of composition for the benefit of his creditors. George Barker was examined, and deposed, that he had in his possession a deed of the 4th of March 1833, between George Bowser of the first part, Freeman of the second part, and himself of the third part, being a mortgage for securing payment of certain sums of money to Freeman and himself; and that the said deed was signed, sealed, and delivered by the said George Bowser, and duly attested, and he declined to pro-

duct it. Barker was served with a *subpoena duces tecum*, and produced the deed at the hearing, and the same was proved *visâ voce* by the attesting witness, in the usual form. There were also proved several equitable assignments of the premises, by way of security for money advanced.

Mr. Sharpe and Mr. Chandless, for the plaintiffs.—The plaintiffs have filed their bill within the time limited by the 4 Geo. 2. c. 28; and it is not in issue, that the ejectment was brought for any other breach of covenant than non-payment of rent. By the general principles of a court of equity, they would have been entitled to come for relief at any time on payment of the arrears and the costs. That statute merely gave a benefit to the landlord, by enabling him, in the action of ejectment, to dispense with certain formalities, and limited the tenant's right to come for relief in equity to a period of six months after execution. If the tenant comes before execution had, to restrain the landlord by injunction, then he must pay the money into court within forty days after answer; but if after execution, that provision of the act does not apply, as the landlord has ample security by having possession of the estate. The 3rd section only contemplates the case of a tenant asking to have or continue an *injunction*. The only requisite of the statute that applies to this case has been complied with, namely, by filing the bill within the six months. If other breaches of covenant are alleged, the Court would direct an issue to try that question.

Davis v. West, 12 Ves. 475.

Hill v. Barclay, 18 Ibid. 56.

Lowat v. Lord Ranelagh, 3 Ves. & Bea. 24.

Mr. Temple and Mr. Walker, for the defendants, the lessors.—The plaintiffs, coming for relief under the statute, were bound to pay the money into court within the time there specified. It has been so decided by Lord Redesdale, upon 4 Geo. 1. c. 5. (Irish statute), which is similar in its provisions—*O'Mahony v. Dickson* (1). The plaintiffs' bill must, therefore, be dismissed; but the circumstances of the case are suffi-

cient to prevent the Court giving relief. This is not a case of accidental non-payment of rent, but the tenant has been in arrear for several years together. There have been also other breaches not relievable in a court of equity, namely, non-delivery of accounts, assignments without licence. By the terms of the proviso in the lease, there remains nothing for the Court to operate upon; the lease is absolutely null and void.

[WIGRAM, V.C.—Is not that always so, in the case of a landlord's re-entry?]

The cases are distinguishable. In the one case, there is a power of re-entry, where the lease, though virtually suspended by operation of law, is presumed to exist in equity; in the other case, the term is altogether gone.

Finch v. Throckmorton, Cro. Eliz. 221.

Mulcarry v. Eyres, Cro. Car. 511.

Doe d. Bryan v. Banks, 4 B. & Ald. 401.

It is also proved in the cause, that the lessee before his death, and his estate afterwards, was insolvent within the terms of the proviso. Besides the decree in *Pitt v. Bonner* there was the legal mortgage to Freeman, with a power of sale, and that deed was sufficiently proved at the hearing. The ejectment was brought, not for non-payment of rent, but, generally, for breaches of the covenants; and if other breaches can be shewn, the Court will not relieve—*Wadman v. Calcraft* (2). Neither will the Court infer a waiver of such breaches, but it must be proved—*Roe d. Gregson v. Harrison* (3). To give *exclusive* possession to a party, comes within the meaning of the term "demise"—*Roe d. Dingley v. Sales* (4). As to what is insolvency, the cases are collected in 3 *Sugd. Vend. & Pur.* 318. *Bayly v. Schofield* (5), *Biddlecomb v. Bond* (6), shew that it is sufficient to prove insolvency in the popular sense of the term. The Court will always look at the general conduct of the party seeking relief—

Dorington v. Jackson, 1 Vern. 449;

Gowley v. the Duke of Somerset, 1 Ves. & Bea. 68;

(2) 10 Ves. 67.

(3) 2 Term Rep. 425.

(4) 1 Mau. & Selw. 297.

(5) 1 Mau. & Selw. 338.

(6) 5 Nev. & Man. 621; s. c. 5 Law J. Rep. (N.S.) K.B. 47.

(1) 2 Sch. & Lef. 400.

and, if there have been gross and determined breaches of the covenant, will give no relief.

Mr. Sutton Sharpe, in reply.—As to proof of an exhibit *visd voce*, the rule is laid down in *Lake v. Skinner* (7). It must not be anything that requires more than proof of handwriting to substantiate it; if it be anything that admits of cross-examination, &c., it cannot be received.

Earl of Pomfret v. Lord Windsor, 2 Ves. sen. 472.

Barfield v. Kelly, 4 Russ. 355.

2 Fowl. Exch. Prac. 187.

Hinde's Chanc. Prac. 270.

Besides, they might have compelled Barker to produce the deed at the time of his examination. As to the forfeiture, whether the proviso in the lease were for a mere power of re-entry, or whether the lease were declared absolutely void, it was the settled practice before the statute to relieve; only, in the latter case, the Court decreed a *new* lease for the remainder of the term—

Taylor v. Knight, 4 Vin. Abr. 407;

Hill v. Barclay, 18 Ves. 56;

1 *Storey's Eq. Juris.* 85;

and this in analogy to the case of redemption of a mortgage. The statute now takes away the necessity for a new lease. The tenant is not bound to pay money into court, till he seeks to keep the landlord out of possession, or to regain possession himself. In *Wadman v. Calcraft*, no money was paid into court. In *O'Mahony v. Dickson*, Lord Redeale remarks that the words of the Irish act are "imperative." As to the merits, the defendants cannot set up the irregularity of the accounts as a forfeiture, for they have waived them. The term "insolvent," construed with the context, means taking the benefit of the act. An equitable deposit of a lease is no forfeiture.

Doe v. Bevan, 3 Mau. & Selw. 353.

Doe v. Hogg, 1 Car. & Pay. 160.

The alleged assignment to Barker is not properly proved, as not being set out in the answer. The only thing the Court can do, is to direct an issue as to that point.

WIGRAM, V. C.—Those points in this case, about which I have no doubt, I will now dispose of, reserving only those other points about which I at present feel considerable difficulty. In the first place, some

(7) 1 Jac. & Walk. 15.

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observations were made as to this being a bill by two executors only; Meredith, the third, refusing to join as plaintiff, but giving no reason for such his refusal. I pass over this, as I do not think it ought to have any weight on the mind of the Court. Assuming the bill, therefore, to be properly brought, the first point made was, that, according to the provisions of the 4 Geo. 2. c. 28, no relief could be given at the hearing, because the plaintiffs have not, within forty days after the answer was put in, brought the arrears of rent into court. The question I have first to consider is, whether they were bound to bring this money into court, under pain of having their bill dismissed with costs at the hearing. If I look at the act of the 4 Geo. 2, it seems to me impossible to mistake the true construction. The 2nd section facilitates the means the landlord has of recovering the possession of property, where the rent has been in arrear for more than half a year; and several things, which by the previous law were necessary, are by this act dispensed with, and the landlord is empowered to recover in a much more summary way. Before this statute, the tenant might almost at any time after possession actually recovered, have filed his bill to be restored, on payment of all the arrears then due. But that act provides that the tenant, to entitle himself to this relief, shall file his bill within six months from the time of execution executed, or else be debarred of all remedy. In the present case, the bill has been filed within the six months allowed by the statute.

Now the 3rd section of the act is the one on which the obligation of the tenant to pay the money into court, is supposed to be founded. Previous to this act, the tenant, before possession had been recovered against him, or even before judgment recovered, might have filed his bill against the landlord, and obtained an injunction to restrain the landlord from recovering possession, the tenant in the meantime remaining a debtor to the landlord for the amount of the rent, and no security being given to the landlord for the payment of rent accruing due before the cause came to a hearing. In another case, the landlord might have actually got possession of the property before the tenant filed his bill, and all the tenant would then ask would be, that at the hearing of the cause

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the Court would order the landlord to give up possession of the estate on payment of the rent. I do not now at all go into the question of what the Court would do, if it made a decree in favour of the tenant. The objection is, that the omission of the tenant to pay in the amount of the rent, within forty days after answer, has deprived him of all right of prosecuting his suit in this court. The words of the 3rd section are, "That in case the said lessee or leasees, his, her, or their assignee or assignees, &c., shall within the time aforesaid, file one or more bill or bills for relief in any court of equity, such person or persons shall not have or continue any injunction against the proceedings at law on such ejectment, unless he, she, or they do or shall within forty days next after a full and perfect answer shall be filed by the lessor or lessors of the plaintiff in such ejectment, bring into court and lodge with the proper officer, such sum and sums of money as the lessor or lessors of the plaintiff in the said ejectment shall, in his, her, or their answer, swear to be due and in arrear, over and above all just allowances; and also the costs taxed in the said suit; there to remain till the hearing of the cause, or to be paid out to the lessor or landlord, on good security, subject to the decree of the Court. And in case such bill or bills shall be filed within the time aforesaid, and after execution is executed, the lessor or lessors of the plaintiff shall be accountable for so much and no more, as he, she, or they shall really and *bonâ fide*, without fraud, deceit, or wilful neglect, make of the demised premises."

The provision as to the payment of the money into court, there to remain until the hearing of the cause, clearly contemplates the case of the tenant applying to the Court for relief, by way of injunction, to prevent the landlord turning him out of possession. In all those cases, if the injunction is to be granted, the Court is bound to impose the terms specified in the act; but, if the landlord is actually in possession before the bill is filed, and the tenant asks no relief till the hearing, this provision of the act does not apply; and the Court acquiring no jurisdiction over the plaintiff till the hearing, the general rules of the court must decide what is to be done; and this clause of the act, applying only to the case where

the party applies either to have or continue the injunction, cannot be extended to the relief which the Court is to give at the hearing. But I was referred to a case of *O'Mahony v. Dickson*, where it was said that Lord Redesdale had in effect decided to the contrary, on the 4 Geo. 1. c. 5, an act of the Irish Parliament, analogous to that on which I have been observing. Now, if that Irish act had in point of fact been worded in the same way as the English act, and Lord Redesdale had put a judicial construction upon it, I should, of course, in deference to his judgment, have hesitated long before I gave a contrary opinion. But when that Irish act is referred to, the language of it completely bears out the decision in that case. Lord Redesdale, in his judgment, observes, that the words of the act are imperative, that the party, "after execution levied" in ejectment, shall, on filing a bill, even within the six months, bring both rent and costs into court. If the English act were similar in its terms, I should feel bound by that decision. But my opinion on this part of the case is, that I am not precluded by the non-payment of the rent and costs from giving relief, if a case for relief is made out. Now, the next point taken was of this nature, that there are two different species of provisoes found in leases; in some of them there is a common clause of re-entry on non-payment of rent, and nothing more; in others, there is a proviso declaring that if the rent is not paid, the lease shall become absolutely void; that, this being a case in which the words are, "that the lease shall become absolutely void," there is no lease at all for the Court to restore to the tenant—nothing for it to act upon; and therefore the Court would not give relief. Now, it certainly struck me at the time, that the argument was fallacious. If it could be shewn that a court of equity could give relief in those cases only where the landlord had not entered, the argument might have been well founded; but, inasmuch as in most of the cases where relief has been given the bill was filed after the landlord's entry, the argument must be fallacious, because, when the landlord has entered, the lease is just as much at an end in a court of law, whether the proviso is for re-entry merely, or that the lease shall become absolutely void. It was said, how-

ever, that the contract of the parties was different: that where it is declared the lease shall become absolutely void on non-payment of the rent, the true construction is, that the parties meant to say the lease should in fact be at an end; and no relief should be given against the consequence of non-payment of rent. I by no means accede to that proposition. Now, what is the legal effect of the contract in each of the cases? In the one, it is, that the simple non-payment of rent shall make the lease void; in the other, the non-payment of rent, followed by the landlord's entry, shall make the lease void. The contract is the same in both cases, in this sense, that there are certain acts to take place, which are to determine the lease altogether. In the present case, the lease, after providing that the tenant shall not assign, &c., has this proviso,—“That if the said G. B, his executors, &c. shall not pay to Sir H. Owen, his heirs, &c., the rents reserved in the lease within fourteen days next after the same shall become due, being lawfully demanded; or if the said G. B, his executors, &c., shall make default in keeping the covenants specified therein, it shall be lawful for Sir H. Owen, his heirs and assigns, to enter into and upon the said premises.”

This is nothing more than the common clause of re-entry in the case of a breach of covenant; and, if the landlord enters under this power, the legal consequence of such re-entry is, that the lease becomes to all intents and purposes forfeited, and the term determines and becomes utterly void. The addition of the words, that “the lease, as to the term hereby granted, shall in that case be forfeited, and the same term shall cease, determine, and be utterly null and void, as if the same had never been made and created,” expresses merely the legal effect of the landlord's entry. The latest decision upon the subject that I have been able to find, is the case of *Arnsby v. Woodward* (8). A lease had been granted, with a proviso, that if the rent should be in arrear for twenty-one days after demand made, or if any of the covenants should be broken, the term thereby granted, or so much thereof as should be then unexpired, should cease, determine, and be wholly void; and it should be law-

ful to and for the landlord, upon the demised premises wholly to re-enter, and the same to hold to his own use, and to expel the lessee. The only difference between those two cases being, that in the case cited, the declaration that the lease should become void precedes, and the right of re-entry to the landlord follows; a consequence of law which would attach to the lease being forfeited: in the present case, the clause of re-entry precedes, and the declaration of legal consequences follows. In that case *Doe v. Banchs* and *Rede v. Farr*, were both cited; and Lord Tenterden, after holding that notwithstanding those clear words making it void, the acceptance of subsequent rent would keep the lease alive, says, “the proviso in this case is not precisely the same as in those cited: for here, after a statement that in certain events the term should cease, determine, and be utterly void, it is added, ‘and it shall be lawful to and for the landlord to re-enter.’ Taking those two clauses of the proviso together, the sound construction of them gives to the landlord a right to re-enter, to be exercised or not, at his election: otherwise the latter clause, ‘it shall be lawful to re-enter,’ would have no effect. I think it may fairly be construed, as if the two members of the sentence were transposed, and then there can be no doubt that a receipt of rent, after the breach of covenant, would be a waiver of the forfeiture.” Nothing can be stronger than that, because all the old cases went to shew, where the true construction of the proviso is, that the lease should become actually void, no acceptance of rent could set up a term, which had, in point of fact, ceased by the very act of the parties. I wish it be understood, that I do not mean to give any opinion, as to whether in abstract cases there would be a difference in a court of equity, between the common case of a power by a landlord to enter, and a clause declaring that the lease shall be to all intents and purposes null and void. I found myself entirely upon the construction of the words in the clause, in which construction I am supported by what Lord Tenterden says in *Arnsby v. Woodward*, that this is nothing more in effect than a clause of re-entry; and which therefore brings this case within the ordinary cases in which a court of equity will give relief. I certainly am very much confirmed in that opinion, by the case

(8) 6 B. & C. 519; s. c. 5 Law J. Rep. K.B. 199.

of *Taylor v. Knight*, and by Lord Eldon's observations on the state of the law in *Hill v. Barclay*, that the Court formerly used to consider, in conformity with the decisions at law, that where the landlord had entered, the lease was gone, and the only way they could give relief was by creating a new lease. But now the statute recognizing the right of the tenant to be relieved, dispenses with that which is a mere form, and declares that the last lease should be deemed to have continuance. The analogy also to the case of mortgages fortifies the reasoning in the same way. In point of fact, the object of the proviso in both cases is the same; in this it is to secure to the landlord the payment of his rent; and the Court therefore considers, whether rightly or wrongly is immaterial, that provided the landlord has his money paid him at any time, he is as well off as if he had it paid to the day. As to the next point, it is clear, that the defendants are at liberty to shew, that there have been other breaches of covenant, which, if proved, would work a forfeiture on grounds independently of the non-payment of rent—*Hill v. Barclay*, *Lowat v. Lord Ranelagh*, *Thompson v. Guyon* (9). Whether those breaches of covenant are to be proved in the cause, or to be tried in an issue, must, I apprehend, depend very much on the form and the course which the pleadings have taken. If the defendants had fully set forth in their answer, the deed by which an assignment without licence had been made, and proved the case distinctly, I am not aware of any reason why I should not at once have decided, that the plaintiff should not have the relief prayed. The deed constituting the alleged assignment is produced by Barker, and proved *vidæ voce* at the hearing. The only questions put by the registrar to the witness on such an occasion are, "Is that your handwriting? Did you see G. B. sign the deed? Did you see him deliver it?" But, if the deed is a material deed, and is not set forth in the pleadings, so as to give the other side an opportunity of challenging it, that proof will not be sufficient. Here the answer merely says, that a counterpart of the lease is in the possession of Barker, with whom it was deposited by George Bowser, the elder, and that Barker claims a lien by

virtue of such deposit. That is not a sufficient allegation to enable the party to use the deed so proved at the hearing. The other questions, as to the alleged insolvency, and the conduct of George Bowser, in not duly delivering accounts, I shall reserve for consideration.

Nov. 24, 1841.—WIGRAM, V.C.—The questions on which I thought it right to reserve my opinion, were two;—first, whether the defendants (the Colbys) had proved, in this cause, any such breaches of the covenants in the lease as would work a forfeiture of that lease at law; or whether they were entitled to have such question tried in an issue of action;—and, secondly, whether the acts and conduct of George Bowser the elder, in his dealings with the property in question, had been such as to deprive him of his right to the assistance of a court of equity, in relieving against a forfeiture occasioned only by a breach of his covenant to pay the rent reserved by the lease. The first ground relied on by the defendants, other than non-payment of rent, as enabling them to eject the plaintiffs, was the alleged neglect or omission of George Bowser the elder to deliver regular accounts of the minerals, according to a covenant in the lease. I cannot think, on the evidence before me, it would so have been treated at law; for I think the neglect or omission to deliver those accounts must have been within the knowledge of the lessor; and the subsequent dealings of the lessor with the tenant, may have amounted to a waiver of the consequences occasioned by such breaches. But I must not be understood as intimating any opinion on the question, whether the covenants I am now referring to have been broken or not. The next ground relied on, as having entitled the defendants to enter and avoid the lease, was the alleged insolvency of G. Bowser the elder. In answer to this point, it was contended, for the plaintiffs, that the word "insolvent" imported an insolvency whereby the property of the insolvent would by law be divested out of him, and transferred to another; and further, that if such were not the meaning of the word in the abstract, its meaning in that sense was fixed by the context of the words in the covenant in the lease. The cases as to the sense in which the word "insolvent" is

to be construed, where the clause containing it does not itself fix its meaning, are numerous.

Reader v. Knatchbull, 5 Term Rep. 218, n.

Bayly v. Schofield, 1 Mau. & Selw. 338.

Dakin v. Cope, 2 Russ. 170.

The Birmingham Benefit Society's case, 3 Sim. 421.

Cutten v. Sanger, 2 You. & Jer. 459; and

De Tastet v. Le Tavernier, 1 Keen, 161;

s. c. 3 Sug. Ven. & P. 318.

I abstain, however, from giving any opinion upon this point; because, so far as my ultimate judgment in this case may depend on the insolvency of G. Bowser the elder, I certainly consider the plaintiffs entitled to the benefit of an issue to try the fact. Independently of other considerations, the ground on which the defendants rely for establishing the fact of insolvency, is not so brought forward on the pleadings, that the plaintiffs could be prepared to meet the evidence adduced by the defendants. The third and only other ground, except the non-payment of rent, on which the defendants have relied as a ground for avoiding the lease, was the breach of the covenant not to assign without licence. The specific breaches of the covenant brought, or attempted to be brought, under my notice, are an assignment to one Freeman, in 1833, by way of mortgage, and a decree of this Court, in *Pitt v. Bowser*, declaring a party in that cause entitled to an assignment of the lease or some interest in it, and decreeing the same accordingly. These, as I understand the case, are the only two cases of actual legal assignment of the property, relied on. The other cases of dealings with the property, to which the pleadings refer, are not, as I understand the defendants' case, relied on as legal assignments. Without going into the question, whether the evidence in support of this is sufficient or not, I am of opinion, I cannot consistently with justice bind the right of the plaintiffs, without giving them an opportunity of trying the case in an issue. Whatever view I might have taken, if George Bowser the elder were living, neither of these alleged assignments is so pleaded in the answer, that I can consider the plaintiffs, who were executors only, as having had a fair opportunity of trying the question. The remaining question is one on which I have felt great difficulty, I admit, that a

case may well exist, in which a lessee shall have so dealt with the property of his lessor, or so acted as to deprive himself of all right to equitable interference in redeeming his lease, forfeited by non-payment of rent, though no covenant, other than that, may have been broken; but I entirely disclaim the proposition, that a court of equity is to exercise a mere arbitrary discretion upon this subject; or that the equitable considerations which are to deprive the plaintiffs in this case of their right to redeem their testator's lease, are such as are not capable of being defined, or at least of being reduced to a principle. In the absence of authority upon this specific point, I refer to cases which appear to me to be most nearly analogous to the present case; that is, the cases in which the Court has occasion to consider, whether the acts or circumstances of a plaintiff asking specific performance of an agreement to grant a lease, are such as to deprive him of the aid of the Court in obtaining such lease by its decree. In the first place, I think I could not hold, that a mere equitable agreement respecting the property, not accompanied with change of possession, would work a forfeiture of the lease in equity, if the acts which are relied on as working a forfeiture at law, can be got over. Independently of this, in considering the acts imputed by the defendants to the plaintiffs, I am bound to consider at the same time, what have been the acts of the defendants in relation to the same matters.

Now I take it to be a settled principle of this Court, a principle more strictly applicable to mining property than any other, (*Norway v. Rowe* (10), and other similar cases) that a party who witnesses a breach of contract by another, and instead of applying promptly to this Court for relief, lies by and permits the alleged wrong-doer to proceed in the acts complained of, incurring expense and liabilities,—a party so acting, will be considered, in this court, as having waived the wrong he complains of, and will be left to his legal remedies. Now what has been the conduct of the defendants in this case, with respect to the principal acts which they impute to the plaintiffs? With respect to the non-delivery of accounts according to the covenant, I have already observed upon

their conduct. The alleged insolvency, according to the defendant's evidence, was known to them in April 1835. The alleged fact, that possession of the property had been given over to George and Samuel Bowser, as mortgagees, was known in December 1835; and the time when the several alleged agreements became known to the defendants was nowhere brought to my notice. It is true that the defendants allege and prove that an action was commenced in October 1835. That action is kept pending over the plaintiffs till February 1837, when judgment was signed. In the summer of 1837, the defendants discover that they can have access to the mines from their own lands, and it is not till the following Michaelmas that instructions are given by the defendants to their solicitor to carry the judgment into effect. In the meantime, the trustees of J. Colby might have been carrying on a treaty with Samuel Bowser, (who was not the representative of Bowser's estate,) to grant a lease of the premises, in substitution of the lease in question, and the proceedings against Bowser's estate were therefore suspended. The infancy of John Colby, till 1837, is no excuse for this delay, for his trustees had full power, and were acting in respect to this part of his estate.

For these and similar reasons, which the pleadings and evidence disclose, I think I shall best consult the justice of the case by making the result of this suit depend on the right of the defendants to enter and determine the lease at the time when judgment was recovered in the ejectment. The only remaining question is, in what form the issue should be directed, and what amount of money, if any, is to be paid into court.

Dec. 8.—*Mr. Temple and Mr. Walker*, for the defendants, contended that the issue ought to be similar to that directed in *Thompson v. Guyon*, and that the plaintiffs ought to be ordered to bring into court, in the first instance, the arrears of rent, with interest from the time it became due—*Ex parte Vaughan* (11), and also a sum of money to answer the costs of the ejectment, and also the costs of this suit; for that confessedly, upon the pleadings, the plaintiffs represented an insolvent estate, and the defendants were

entitled to some security that the plaintiffs were able to redeem the lease.

Mr. S. Sharpe and Mr. Chandless, for the plaintiffs, contended that the application for payment of the money into court proceeded upon a fallacy, for that was never done, except the Court, by its interposition, deprived the landlord of some security which he might otherwise have had. The Court was only now trying, by an issue, that which might have been tried by the evidence before the Court. In *Wadman v. Calcraft*, an issue was directed, but the money was not ordered to be brought into court. That there was no object to be gained by it; for, if the plaintiffs failed in the issue, the Court could not order the defendants' debt to be paid out of the money in court.

The Court directed two issues to be tried, corresponding to the first and third issues in the case of *Thompson v. Guyon*, and reserved, for consideration, the question as to the payment into court of the rent and costs previous to the trial of the issues.

Dec. 11.—WIGRAM, V.C.—I am of opinion, that, in giving the plaintiffs an issue, I ought to impose upon them the terms of bringing into court the rent due at the time possession was recovered by the landlord, and the costs at law. On a former occasion, I had great doubts whether this case was within the scope of the cases where such terms had been imposed. It is rather the converse of them. The ordinary cases are, where the defendant in equity is proceeding against the plaintiff at law, and the Court, on equitable grounds, restrains the assertion of the legal right. In this case, it is required that the plaintiffs should pay money into court which they are not bound to pay, unless they succeed in their suit, and which they have only offered to pay, on condition of obtaining a contemporaneous execution of the lease. My decree, therefore, will be special in this respect. While I disclaim a right to exercise an arbitrary discretion, I am perfectly satisfied that I am right in this case. The plaintiffs are the representatives of George Bowser's estate, and it is only in that character that I know them. The case made by the bill is, that the plaintiffs, and the defendant Meredith, as the personal representatives of G. Bow-

ser the elder, are entitled to the relief prayed. The defendants say, that G. Bowser the elder, previous to and at the time of his death, was insolvent, within the meaning of the proviso in the lease; and the lessors complain that the existence of the present suit is seriously prejudicial to their interests, and ask that they may have security that the plaintiffs will be able to redeem the lease. Though that point is not sufficiently clear upon the pleadings that I can immediately decide it, yet I cannot overlook the fact that there is evidence strongly tending to prove the insolvency. The fact of such insolvency being proved, is not inconsistent with the plaintiffs succeeding on the trial of the issues.

The decree made was, that the plaintiffs should pay 700*l.* into court on or before the 28th of January 1842; and the issues directed were—first, whether George Bowser the elder, his executors, &c., had committed any breach of the covenants, &c. other than in respect of non-payment of rent, or had become insolvent within the terms of the lease; secondly, whether Sir H. Owen, his heirs or assigns, had waived the forfeiture. Defendants (except Meredith) to be plaintiffs at law; plaintiffs and Meredith to be defendants at law. In case the 700*l.* should not be paid into court by the time appointed, the bill to be dismissed, with costs.

WIGRAM, V.C. }
Dec. 11, 13, 14. } SLADE v. SLADE.

Pleading—Plea and Answer—Amended Bill—General Demurrer.

Where a defendant has filed a plea and answer to the original bill, he cannot demur generally to the amended bill.—Sed quære, if an entirely new case is made by the amendments.

Bill by the next-of-kin of A, against B. & C, administrators of A, and executors of R. (under whose will A. was a legatee), praying an account of both estates. B. & C. answered as to A's estate, and pleaded, as to the account prayed of R's estate, an account settled with A. Plaintiffs amended by inserting merely the substance of the plea by way of pretence and avoiding it. The defendants then demurred generally for multi-

furiosness. Demurrer overruled, on the ground that the cause of general demurrer existing in the original bill was waived by the plea and answer put in.

This was a bill by some of the next-of-kin of Anna Slade, against the representatives of Anna, and against the representatives of Robert Slade, the father of Anna.

Robert Slade, the testator, by his will, dated the 14th February 1829, after giving certain legacies, gave the residue of his real and personal estate to five trustees, whom he also appointed his executors, and of whom the defendants Robert Slade, James Slade, and Thomas Slade, were three, in trust for all his children equally on their attaining twenty-one, and, in the event of any of them dying under age, and without leaving issue, with benefit of survivorship to the others. The testator died on the 17th of March 1833, and Robert and James Slade proved his will. The bill charged that Thomas Slade, though he did not prove, had acted in the trusts, and had got in part of the personal estate. The trustees carried on the testator's trade till Anna Slade came of age, and had sold the real estate. The testator left five children, who attained twenty-one, and who, under his will, were entitled to his residuary estate in equal shares. Anna Slade attained twenty-one in December 1836, and in March 1839 died intestate. On the 13th of February 1840, Robert and James took out administration to Anna. The original bill stated that they had a large sum in their hands as Anna's estate; and that a considerable part of Anna's estate consisted of her residuary share of her father's estate, which had never been paid over to her, and which was still due; and that no account had been rendered to her by the executors of the father's estate.

The bill then prayed an account generally of all the father's estate against his executors, and also an account of the personal estate of Anna against her administrators. To this bill Robert and James put in a joint plea and answer; as to that part of the bill which prayed an account of the father's estate, pleading an account stated with Anna, and answering as to that part which asked an account of Anna's estate. The plaintiffs submitted to the plea, and

amended their bill, stating the settled account by way of pretence, and charging that no such account was ever settled; and that, if it was, the same was fraudulent and void. To the bill so amended, the defendants, Robert and James, put in a general demurrer, on the ground of multifariousness.

Mr. S. Sharpe and *Mr. Freeling*, for the demurrer.—The effect of the plaintiffs' submission to the former plea, was, to strike out of the original bill so much of it as related to the testator Robert Slade's estate; in that state of the record, therefore, the objection of multifariousness did not arise. This distinguishes it from *Ellice v. Goodson* (1). After a plea submitted to, and the bill amended, a demurrer will lie to the whole amended bill.

Prosser v. Edmonds, 1 You. & Col. 481.

Ritchie v. Aylwin, 15 Ves. 80.

The bill is multifarious—*Marcos v. Pebrer* (2); in which case the Vice Chancellor disapproved of the decision in *Turner v. Robinson* (3).

Saxton v. Davis, 18 Ves. 72.

Pearse v. Hewitt, 7 Sim. 471; s. c. 7 Law J. Rep. (n.s.) Chanc. 286.

Mr. Teed and *Mr. Wilcock*, for the bill.—This bill is not multifarious, for all the parties interested in Robert Slade's estate are interested in Anna's—*Campbell v. Mackay* (4). The executors having employed the money of Anna in their business, the case is within the principle of *Bowsher v. Watkins* (5). But the demurring defendants have answered part of the original bill, and the case, as to that part, not being varied by the amendment, they cannot now put in a general demurrer—*Ellice v. Goodson*; for the original bill was subject to the same objection. It is said, that that part of the original bill must be considered as struck out by the plea submitted to: if that were so, the defendants' answer to that part is still on the file. The 36th of the Orders of August last applies only to the case of a partial demurrer, and not where the demurrer is to the whole bill.

(1) 3 Myl. & Cr. 653; s. c. 7 Law J. Rep. (n.s.) Chanc. 147.

(2) 3 Sim. 466.

(3) 1 Sim. & Stu. 313.

(4) 1 Myl. & Cr. 603; s. c. 6 Law J. Rep. (n.s.) Chanc. 73.

(5) 1 Russ. & Myl. 277.

Mr. S. Sharpe, in reply.—After the bill is amended, it stands in the place of a new bill—*Spencer v. Bryan* (6). After a plea submitted to, a defendant may put in a general demurrer.

Robertson v. Lord Londonderry, 5 Sim. 226; s. c. 3 Law J. Rep. (n.s.) Chanc. 20.

Prosser v. Edmonds, 1 You. & Col. 481.

Lloyd v. Douglas, 4 Ibid. 448; s. c. 10 Law J. Rep. (n.s.) Ex. Eq. 34.

Stephens v. Frost, 2 Ibid. 306; s. c. 6 Law J. Rep. (n.s.) Ex. Eq. 41.

In *Davis v. Davis* (7), it said, that the case of *Bowsher v. Watkins* does not establish the general proposition contended for, but collusion must be proved.

WIGRAM, V.C.—The question is, whether a general demurrer will lie to the amended bill, there being an answer to the original bill, and a plea, to which the plaintiffs submitted. The general rule is, that where there is an answer to any part of the original bill, you cannot file a general demurrer. The reasoning in the old cases is, that the amended bill is considered as the original bill, written upon. If the Court had then done what Lord Cottenham did in *Ellice v. Goodson*, asserted a right to look into the record, they might have framed a rule which would have done justice to the parties. I will not finally decide this case, till I have looked into the pleadings. The question is, whether the defendants, by their plea, have not waived the objection of multifariousness; if so, it cannot be revived. By the Court asserting a right to look into the record, it gets rid of the embarrassment of the old rule. If I should come to the conclusion that the objection has been waived, it will not be necessary to decide the question of multifariousness.

Dec. 14.—WIGRAM, V.C.—In this case the defendants have demurred to the amended bill for multifariousness; the same objection, if it exists in the amended bill, existed also in the original bill. The defendants filed a plea and answer to the original bill; the plea insisting merely upon a settled account. This was a submission, on the

(6) 9 Ves. 231.

(7) 2 Keen, 534.

part of the defendants, to have two distinct subjects disposed of in one suit, subject only to the question, whether the amount was to be taken as on the settled account. Upon the authority of *Ellice v. Goodson*, I am bound to overrule this demurrer; but, if it is desired by the defendants, I will, in the order giving them time to answer, declare that such order shall not prejudice any application they may be advised to make for leave to plead. It is on the special ground that a plea of a settled account has been submitted to, that I think I can grant this indulgence without infringing any rule of the Court.

Demurrer overruled.

WIGRAM, V.C. }
Jan. 11. } BLEW v. MARTIN.

Practice.—Service of Copy Bill—23rd and 24th New Orders—Affidavit.

For the purposes of the 23rd of the Orders of August 1841, it is not necessary to serve an "office" copy of the bill: an examined copy is sufficient.

The plaintiff moved, under the 24th of the Orders of August 1841, for leave to enter a memorandum in the six clerks office, of the service and time of service of the copy of a bill, omitting the interrogating part, upon the defendant, B. Blew, under the 23rd of the same Orders. The affidavits in support of the motion were, first, the affidavit of B, who deposed that he had carefully examined the paper writing marked A, and shewn to the deponent at the time of swearing the affidavit, with a bill filed in this honourable court by the above-named plaintiff, on or about the 17th of December 1841, against the above-named defendants, and that the same was a true copy of such bill, omitting the interrogating parts; that the bill did not, as against the said defendant, pray a subpoena to appear and answer, but prayed that the said defendant, upon being served with a copy thereof, might be bound by all the proceedings in the cause. The second affidavit was that of X. Y., of Bristol, who deposed that he did, on the 5th of January instant, personally serve the defendant B. Blew with a true copy of the bill,

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referred to in the affidavit of B, sworn in the cause on the 4th of January 1842, marked with the letter A, filed by the above-named plaintiff against the above-named defendants, by delivering to and leaving with the said B. Blew the said copy bill.

Mr. Sutton Sharpe and *Mr. Neate*, in support of the motion, said, that the object of the Orders being to avoid expense to the suitors, the terms of the order would be satisfied by service of an examined copy of the bill, and that an office copy was not necessary.

The VICE CHANCELLOR concurred, and made the order.

V.C. }
Jan. 28. } GODDEN v. CROWHURST.

Will, Construction of—Clause against Alienation—Bankruptcy.

A testator bequeathed his residuary estate to trustees, to pay the dividends to his son for life, but if his son should assign, or charge, or alienate his interest, then upon trust to apply the dividends for the maintenance and support of his said son, and any child or children he might have, and for the education of such issue as the executors should think fit. The son became bankrupt:—Held, that the assignees were not entitled to any share of the son's interest, but the trust was for the benefit of the son, and the wife, and the children collectively.

George Staffell, by his will, dated the 25th of April 1829, gave and devised all his real estates to William Mauser, Thomas Crowhurst, and J. Allen, their executors and assigns, upon trust to sell the same, and the produce to be considered part of his personal estate. The testator, after giving certain directions as to the payment of debts and legacies, continued, "I give and bequeath the interest, dividends, and annual produce of one moiety of the residue of my estate, unto my son Henry Staffell, and his assigns, for his life; and, subject also as hereinafter mentioned, I give and bequeath the interest, dividends, and annual produce of the remaining moiety of the residue of my estate, unto my daughter Grace Allen (the wife of the said J. Allen,) and her as-

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signs during her life. Provided always, that as the interest, dividends, and proceeds of the residue of my estate, and the rents of my real estate, until sold, shall be received by my executors and trustees, the same shall, after deducting and paying thereout the cost of keeping the messuages, buildings, and premises then remaining unsold, in good repair, and insured from loss by fire or other incidental expenses, be laid out and invested again, as they, my said trustees, in their discretion shall think most advantageous, and be accumulated for the space of five years from the day of my decease; and at the expiration of that period, I direct my executors and trustees, for the time being, to make out an account of all such interest and dividends, and the accumulations thereof, and pay one moiety of such interest, dividends, and accumulations, unto my said son Henry, to and for his own use and benefit, and do and shall pay the remaining other moiety of such interest, dividends, and accumulations, unto my said daughter Grace Allen, to and for her own use and benefit. And I further direct, that after such division of the said interest and produce, the interest, dividends, and annual produce of the said residue of my estate, shall, subject to the deductions assigned, be again accumulated for five years, when a like division shall be made thereof between my said son Henry and daughter Grace, as before mentioned; and such accumulations and divisions shall continue to be made at the expiration of every five years, it being my wish and desire the interest and produce of the residue of my estate should only be divided once every five years, until the respective moieties thereof shall become divisible amongst my grandchildren, as hereinafter mentioned." After a direction as to payment after the death of either son or daughter, the will contained the following declaration:—"And I further declare, that in case my said son shall at any time or times make any assignment, mortgage, or charge of or upon, or in any manner dispose by way of anticipation of the said interest, dividends, or accumulations, or any part thereof, to which he is entitled for life, as aforesaid, or attempt or agree so to do, or commit any act whereby the same, or any part thereof, could or might, if the absolute property thereof were vested in him, my said son, be forfeited unto

or become vested in any person or persons; then and in any of the said cases, upon trust, that they, my said trustees or trustee for the time being, do and shall henceforth pay and apply the said interest, dividends, and accumulations for the maintenance and support of my said son, and any wife, child, or children he may have, and for the education of such issue, or any of them, as they, my said executors for the time being, shall in their discretion think fit."

The testator died on the 1st of January 1830, and during the period of five years from his death, the executors accumulated the rents and profits, and in January 1835, they divided the accumulations between Henry Staffell and Grace Allen, since which time they had retained in their hands the accumulations.

A fiat in bankruptcy was issued against Henry Staffell, on the 31st of May 1837, and the plaintiffs were appointed his assignees. Henry Staffell had three children.

The bill was filed against the surviving trustees and executors of the will, and against Henry Staffell, his wife and children, and it prayed that the will might be established, and that it might be declared, that the plaintiffs, as assignees of the defendant Henry Staffell, were entitled to the moiety of the rents, interest, dividends, and accumulations arising from the real and personal estates of the testator, which the said Henry Staffell would have been entitled to, if he had not become a bankrupt; and that it might be declared, that the direction contained in the will, for the accumulation from time to time of the said rents, interest, and dividends for periods of five years, was not binding upon the said defendant Henry Staffell, previously to his bankruptcy, and was not then binding upon the plaintiffs, as his assignees; and if it should appear that the plaintiffs were not entitled to the whole of the moiety, then that they might be declared entitled to the whole of such part as accrued previously to such bankruptcy, and to some part, not being less than an equal portion with the wife and children, of that which accrued since the bankruptcy, and of that which should accrue during the life of the bankrupt; and if necessary, the trustees might be decreed to account for the accumulations since the division made by them at the end of the first five years

from the death of the testator, and to pay the plaintiffs one moiety on such other portion as the plaintiffs should appear to be entitled to, during the whole or any part of the periods elapsed since such division, and also of the future rents, interest, and dividends of the estate of the testator.

Mr. Richards and *Mr. Bacon*, for the plaintiffs, contended, that the clause in the testator's will, in case of alienation, did not defeat the right of Henry Staffell and his assigns for life, to a moiety of the dividends arising from the testator's estate; and that they, as the assignees under his bankruptcy, were entitled, notwithstanding such direction, to so much of his moiety of the dividends, as had not been paid to him previously to his bankruptcy, and to that subsequently accruing; or that if for any reason the plaintiffs were not entitled to the whole, then that they were entitled to all that had accrued up to the bankruptcy, and a part, not less than an equal portion with the wife and children, of that which accrued subsequently to the bankruptcy; that the direction to accumulate was not binding upon Henry Staffell before his bankruptcy, nor upon the plaintiffs subsequently; and that whatever the plaintiffs were entitled to, which had already accrued, ought to be paid to the plaintiffs immediately, and what they might hereafter be entitled to, should be paid by the trustees as it became due,—and cited *Phipps v. Lord Ennismore* (1). That supposing the person entitled to the life interest had thought fit to make an assignment of it during the five years, the assignee would, of course, take; he had clearly a vested interest in him, but the time of payment was postponed; the assignees were therefore plainly entitled to that which was a vested interest in the bankrupt.

Mr. Lovat and *Mr. Torriano*, for the defendants, Henry Staffell and his wife and children, contended, that the assignees were entitled to no part of the dividends and accumulations which had accrued since the division, and that the wife and children were entitled to have the whole paid to them for their maintenance, support, and education. Upon the act of bankruptcy having been committed, which was an act of forfeiture contemplated by the testator, the

testator had expressly provided for the application of the funds, in such an event, for the maintenance and support of his son's family, at the discretion of the trustees, which constituted the difference between this and cases where there was a provision for the general benefit of the bankrupt, in case of alienation; but as to the alternative of the prayer, that the assignees were entitled to a portion with the wife and children, that was quite impossible, for what portion could it be contended they should take?—*Twopeny v. Peyton* (2).

Mr. Whitmarsh, jun., for the trustees.

Mr. Richards, in reply.

THE VICE CHANCELLOR.—This is a case quite *sui generis*. It has nothing to do with those cases which have held that, where a trader settles his own estate with such a proviso as has been introduced with respect to bankruptcy, that that shall be void as against the creditors. It has nothing to do with that class of cases; therefore, this case must be decided upon the view of the will itself. Here, the testator has given, first of all, his real estate to trustees, in trust to sell, and the proceeds are to be considered as part of his personal estate, and then he makes a disposition of his personal estate; that the trustees are to pay the debts, and then they are to invest the residue of the monies in the parliamentary stocks or funds of Great Britain, or on real securities at interest, and to dispose of them as they please. Then he gives the interest, dividends, and annual produce of one moiety of the residue of his estate to his son for life, and of the other moiety to his daughter for life. Then he introduces this proviso.—[The Vice Chancellor then read the proviso from the will for accumulation.]—I have looked to that part of the will with regard to the gift to the children of Henry and Grace, and there all notion of accumulation disappears; there is no such provision, as I can understand it, with respect to them. Now, it was competent to the testator to make this direction; and what appears to me is this, that both the son and the daughter were interested in this, and I do not myself conceive, that unless the son and the daughter had both concurred in an application to the trustees

(1) 4 Russ. 131.

(2) 10 Sim. 487; s. c. 9 Law J. Rep. (N.S.) Chanc. 172.

to discontinue this accumulation, that that accumulation could properly be discontinued. It is certainly not void. Whether the Court would, in case a bill had been filed by the son and the daughter against the trustees, for the purpose of having the question determined, have interfered, is a different point; that is a matter which I cannot determine now, because I have not the daughter here, but it appears to me that the trust is unquestionably good, at any rate till it is put an end to. There was nothing to put an end to it; and as far as I understand, the accumulation was paid at the end of the five years, and allowed to continue; and it is too much to say, that at the time when a break happens, in the interval between the first accumulation and the second, it is competent for one of the parties interested to interfere with the accumulations; and my notion therefore is, that the trust for the accumulation is perfectly good. The principal point, however, is this question, what is the effect of the limitation? Now, it seems to me, that the accumulations would, by the nature of the trust, go on, that is to say, that nothing having occurred to put an end to the trust for the accumulations, after the end of the first five years, the trust for the accumulations went on. Then the question is, what is the effect of this limitation with respect to the son doing any act, "whereby the same, (that is the accumulations,) or any part thereof, could or might, if the absolute property thereof were vested in him, my said son, be forfeited unto, or become vested in any person or persons"? It is clear, the testator there considered that his son was not to be considered, under his will, as taking the absolute interest: what I mean is, that independent of the words which follow, which attempt to give it over, he here expresses his opinion, that the property was by the will so given, as that the son did not take an absolute interest for life. Then it proceeds to say, "Then and in any of the said cases, upon trust, that they, my said trustees or trustee, for the time being, do and shall thenceforth pay and apply the said interest, dividends, and accumulations for the maintenance and support of my son, and any wife, child, or children he may have, and for the education of such issue, or any of them, as they, my said executors for the time being, shall in their discretion think

fit." Now, I take it, that those words, "or any of them," merely apply to the words, "such issue," such issue meaning "child or children." I point that out, in order that I may give an express opinion upon the point, that this fund, if it be given at all, is given collectively, and not distributively, "for the maintenance and support of my said son, and any wife and child or children." "Or" is merely addressed to children collectively, as the substitute for a single child. It is not a word of distribution, which separates the son from the wife, or from the child. I express it so, because, according to my apprehension, this is a clause in which whatever benefit is intended is given collectively to the son, and the wife, and the children; and it appears to me, that that is the grammatical construction, for the reason I have stated. Then it is given, "for the maintenance and support of my said son, and any wife, child, or children (which is the event that has happened) he may have, and for the education of such issue, or any of them, as they, my said executors for the time being, shall in their direction think fit." Now, there is nothing in point of law to prevent such a gift, that I am aware of. It does not follow that anything was to be paid of necessity, but the thing was to be applied; and there might have been a maintenance of the son, and of the wife, and of the children, without their receiving any money at all. For instance, the trustees might take a house for their lodging, and they might give directions to tradesmen to supply the son, and the wife and the children, with all that was necessary for maintenance; and therefore it appears to me that I am not at liberty to take this as a mere gift for the benefit of the son simply, but it is a gift for his benefit, in the shape of maintenance and support of himself, jointly with his wife and children; and I rather think, that if that is the true construction, the result will be, that the assignees are not entitled to anything. Then the consequence of that would be, that if the trust was a perfect trust for the accumulations for the second period, the whole of it would go over to be applied for the maintenance and support collectively of the son, the wife, and the children; and my opinion, therefore, is, the assignees have no interest at all.

L.C. }
Feb. 9, 12. } HERRING v. CLOBERY.

Attorney and Client—Privileged Communications—Evidence.

Where A. had employed B, an attorney, with reference to the preparation of certain deeds of settlement, and also of an agreement in writing, of prior date to the deeds, and afterwards a bill was filed by A. and others, against B. and C, (C. being interested in supporting the deeds,) to have the deeds rectified, and made consistent with the agreement in writing :—Held, that communications that had passed between A. and B. her attorney, at the time of the preparation of the deeds and agreement in writing, and having relation thereto, were not admissible in evidence against A. objecting thereto.

All communications passing between an attorney and his client, with relation to business to be transacted by the former for the latter, are privileged, such privilege being the privilege of the client and not of the attorney.

In the month of February 1826, a family estate, called Langstone, stood limited under the original settlement of the father, J. P. Herring, dated in the year 1794, to the use of Elizabeth Herring for life, with remainder to John Herring Clobery, in tail male, with remainder to Philip Herring, in tail male, with divers other remainders. Another family estate called Lipscliffe, at the same time stood limited under the will of J. P. Herring, the father, to his widow, the said Elizabeth Herring, for life, with remainder to his eldest son, J. H. Clobery, in fee.

By an agreement in writing, made between Elizabeth Herring and J. H. Clobery, dated the 7th of February 1826, it was provided, that Elizabeth Herring should convey her life estate in the Langstone and Lipscliffe properties, to her eldest son J. H. Clobery, and that she should assist him, by joining in a recovery deed, in barring the remainders limited by the original settlement of 1794, and re-settling the estates, giving him, at the same time, power to raise 4,000*l.*, and that Elizabeth Herring should be paid the value of her life estates, and also be released from a debt she owed J. H. Clobery. The agreement further stipulated,

that J. H. Clobery should reduce his remainder in tail male, in the settled estates, to a tenancy for life, sans waste, with remainder to his children, in tail general, as he should appoint, and in default of appointment, to his sons, in succession, in tail general, and, failing sons, to his daughters, as tenants in common, in tail general, with remainder to Philip Herring for life, sans waste, with a like power of appointment amongst his children, in tail general, with the like consecutive remainders to his sons, in tail general, and, failing sons, to his daughters, as tenants in common, in tail general, with the like remainder to Anne, the wife of John James, (the sister of J. H. Clobery,) with remainder to her son J. S. James, in fee.

By indentures of lease and release, of the 11th and 12th of April 1826, the latter made between Elizabeth Herring of the first part, J. H. Clobery of the second part, John James and Thomas Pearce of the third part, and A. C. Orme of the fourth part, and by means of a recovery duly suffered, the Langstone estate was limited, in the usual formal and technical manner, (subject to a power to raise 4,000*l.*), to the use of J. H. Clobery, for life, sans waste, with remainder to the use of such sons of the body of J. H. Clobery, as he should appoint, with remainder to the use of his first and other sons, in tail male, with remainder to Philip Herring for life, sans waste, with remainder to the use of such sons of the body of P. Herring as he should appoint, with remainder to the use of the first and other sons, in tail male, remainder to John James for life, sans waste, remainder to Anne James, the wife of John James, and only daughter of Elizabeth Herring, for life, remainder to the sons of the body of Anne James, as she should appoint, with remainder to the use of the first and other sons of the body of Anne James, in tail male, with the ultimate remainder in fee simple to J. H. Clobery. Those limitations in several parts materially varied from the limitations contained in the agreement.

The present bill was filed by Elizabeth Herring (since deceased), Philip Herring, her younger son, and Ann Zoe Herring, an infant, his only daughter, against J. H. Clobery, Thomas Pearce, and John James and J. S. James, and sought to have the indentures of the 11th and 12th of April

1826 rectified, and made conformable to the agreement of the 7th of February 1826. The defendant Pearce (who was charged by the bill with having obtained Elizabeth Herring's sanction of the deeds, by means of fraud practised on her,) had been examined as a witness in the cause, on behalf of his co-defendant, J. H. Clobery, with reference to the preparation and execution of the indentures of the 11th and 12th of April 1826, and the communications that passed between the plaintiff Elizabeth Herring and Thomas Pearce, during such preparation and execution, (Pearce having acted as the solicitor of Elizabeth Herring, the plaintiff,) and on his evidence, which proved the concurrence and approbation of Elizabeth Herring as to the variations made from the agreement, being tendered to be read on behalf of the defendant Clobery, it was objected to as inadmissible, on the ground of its consisting in substance of confidential communications that passed between Thomas Pearce, as a solicitor, and his client Elizabeth Clobery, in relation to the transactions in question in the cause. In the court below, the evidence now objected to before his Lordship, on appeal, was rejected as inadmissible, but the Court dismissed the bill with costs, upon the other evidence taken in the cause.

Mr. Tinney, Mr. Wakefield, and Mr. Romilly, for the plaintiffs, cited the following cases:—

- Cromack v. Heathcote*, 2 Brod. & Bing. 4.
- Wadsworth v. Hamshaw*, *ibid.* 5, n.
- Doe d. Shellard v. Harris*, 5 Car. & Pay. 592.
- Greenough v. Gaskell*, 1 Myl. & K. 98.
- Walker v. Wildman*, 6 Madd. 47.
- Harvey v. Clayton*, 2 Swanst. 221, n.
- Earl Cholmondeley v. Lord Clinton*, 19 Ves. 261.
- Bolton v. the Corporation of Liverpool*, 1 Myl. & K. 88; s. c. 1 Law J. Rep. (N.S.) Chanc. 166.

Mr. G. Richards and Mr. Wright, for the defendant J. H. Clobery, cited—

- Du Barré v. Livette*, Peake's N.P.C. 77.
- Duffin v. Smith*, *Ibid.* 108.
- Williams v. Mundie*, Ry. & Moo. 34; s. c. 1 Car. & Pay. 158.

Broad v. Pitt, Moo. & Mal. 233, coram Best, C.J.

Bramwell v. Lucas, 2 B. & C. 745; s. c. 2 Law J. Rep. K.B. 161.

Desborough v. Rawlins, 3 Myl. & Cr. 515; s. c. 7 Law J. Rep. (N.S.) Chanc. 171.

Sawyer v. Birchmore, 3 Myl. & K. 572; s. c. 6 Law J. Rep. (N.S.) Chanc. 277.

Mr. Reynolds, for the assignees of J. P. James, in the same interest with the plaintiffs, adverted to the observations of Lord Tenterden in the case of *Clark v. Clark* (1).

For the other cases on the subject of confidential communications, see *Starkie on Evidence*, vol. 2, p. 320, 3rd edit. where the authorities are collected and observed upon.

The LORD CHANCELLOR.—I have considered the arguments raised, and the authorities cited in this case, and am of opinion, that the principle acted on in the case of *Cromack v. Heathcote* is the correct one, and that where an attorney is professionally employed by a client, any communications passing between the attorney and client, having reference to the business to be transacted by the attorney, are to be considered privileged communications. That decision is in conformity with previous authorities, and with the understanding and practice of the profession on the subject. Several *Nisi Prius* decisions by Lord Tenterden, were cited at the bar, in which a narrower principle had been laid down by that learned Judge; and it was stated, that at first, the privilege as laid down by Lord Tenterden, was confined to cases where suits were about to be instituted, but that the privilege was afterwards extended by the same Judge, to cases where doubts and controversies existed, as to the rights of parties, which might lead to future litigation; and Lord Wynford was inclined, in a case at *Nisi Prius*, to adopt the opinion of Lord Tenterden on the subject, but the practice as laid down by Lord Wynford, in the case I have adverted to, is not supported by any previous authority, nor is it founded on sound principle. Whilst saying this, I do not lose sight of the bribery case which occurred on the Midland

(1) 1 Moo. & Rob. 3.

Circuit (2), the circumstances of which do not seem to be stated with precision and accuracy, and most probably the decision in that case proceeded on other grounds than those appearing. The rule may be as important with reference to liabilities of parties in regard to the title to property, and otherwise as to the actual progress of a cause. In the ordinary transactions of life, persons must represent the state of their affairs to professional men, with the view to obtaining legal advice, and it is very important that such communications should be protected. If the case stood here, I should adhere to the decision already mentioned, of the Court of Common Pleas, instead of the new rule laid down by Lord Tenterden. The point, however, came before Lord Brougham, L.C. (3), and was most elaborately discussed at the bar, when his Lordship solemnly delivered a judgment, which is in conformity with the decision of the Court of Common Pleas, and is quite in conformity with my own opinion on the subject. The same point also came before this Court, during the time of my immediate predecessor, and though a decision on the general question was not called for under the particular circumstances of the case, it is clear, that that learned Judge, from the scope of his observations, was inclined to adopt the principle laid down by the Court of Common Pleas, and that principle is applicable to the evidence of Mr. Pearce in the present case. There can be then no doubt as to the principle on which I ought to act.

Where, therefore, an attorney is employed by a client in his professional character, to transact business for him, all the communications that pass between the attorney and client, for the purpose of the particular business in hand, are privileged communications; and that privilege is the privilege of the client, and not of the attorney. I believe, in what I have stated, I confirm the opinion of the Vice Chancellor of England, as expressed by his Honour, when this case was before him.

(2) 2 Brod. & Bing. 5, n.

(3) The case here referred to, is *Greenough v. Gaskell*, 1 Myl. & K. 98.

WIGRAM, V.C. }
Feb. 18, 21. } KIMBER v. EMSWORTH.

Practice.—40th Order of August 1841
—Absent Party.

Bill against the trustee of a deed, executed by A. B. for the benefit of his creditors, to have the trusts of the deed carried into execution. The bill alleged, that A. B. had died intestate and insolvent, and that no person had taken out administration to him; that the property had been realized, and the proceeds were insufficient to pay the scheduled debts. The Court refused to make a decree under the 40th New Order saving the rights of absent parties, as the representative of A. B. might at any time afterwards file a new bill against the trustee for an account.

In 1815, A. B, by deed, conveyed and assigned all his real and personal estate to Emsworth and another, in trust, to sell and apply the proceeds in payment of the creditors, whose debts were scheduled thereto, and as to the surplus in trust for the said A. B. The trustees entered into possession, and afterwards sold the property and received the proceeds. In 1840, some of the scheduled creditors filed their bill on behalf of themselves, and all other the scheduled creditors, against Emsworth and the assignees of the other trustee (who had become bankrupt), to have the trusts of the deed carried into execution. Since the execution of the deed, it appeared, that A. B. had died intestate; and the bill stated that no person had taken out administration to him, he having left no assets; that all his property was comprised in the deed of trust; that all had been realized by the trustees; and that the proceeds were not sufficient to pay all the scheduled creditors the full amount of their debts.

Mr. Skirrow and Mr. Chandless, for the plaintiffs, contended, that under the circumstances, and the defendants not raising the objection, the representative of A. B. was not a necessary party to the suit, as he clearly had no interest in the matters in question; and that the 40th of the Orders of August 1841 was applicable, enabling the Court to

make a decree saving the rights of absent parties; and *May v. Selby* (1), was cited.

Mr. Osborne, for the defendants.

Feb. 21. — WIGRAM, V.C. — The Court is asked in this case to exercise a discretion under the 40th New Order, in dispensing with the presence of a party, who as representative of the deceased author of a trust deed, for the benefit of the creditors, would be entitled to the surplus, if any. The property was realized, and the proceeds are in court. The object of the 40th Order was this: it very often happened, that a party defendant raised the objection, where the absent party would be as well protected by the decree of the Court, as if he were present; Lord Cottenham approved of an order which would give the Court liberty to proceed, notwithstanding the absence of such a party. That being the intention of the 40th Order, the Court would not exercise the discretion thereby given, if it would prejudice the rights of an absent party. In this case, after the trustees had distributed the proceeds, the representative of A. B. might file a new bill against the trustees for an account; I think therefore I cannot make the order. If the case were now at the hearing on further directions, and the fund not in court, I am not prepared to say that I might not make the order, because the personal liability of the trustees would remain; but the fund being in court, I think I ought not to make the order, as I understand the 40th General Order of August last.

WIGRAM, V.C.	}	GIBSON v. HAYNES.
Feb. 23;		
March 14, 15.		
L.C.		
March 16.		

Practice.—23rd & 24th Orders of August 1841 — *Affidavit* — *Prayer* that defendant may be bound.

The affidavit in support of a motion under the order of August 1841 must state, that the copy bill served was a copy "omitting the interrogating part."

(1) Per Knight Bruce, V.C. Jan. 21, 1842.

The prayer that a "defendant, being served with a copy bill under the 23rd of the Orders of August 1841, may be bound," must be inserted in the prayer of process.

Mr. Bilton moved for leave to enter a memorandum of the service on one of the defendants, of an office copy of the bill under the 24th of the late Orders. The affidavit in support of the motion did not state, that the copy bill served was a copy "omitting the interrogating part."

WIGRAM, V.C.—The practice of the Court is now to require that the affidavit should state that the copy bill was without the interrogating part. The affidavit must be amended.

It appeared, that on application at the office to enter the memorandum, the clerk in court refused to enter it, on the ground, that the prayer "that the defendants A. and B. being served with a copy of the bill, may be bound, &c." was not inserted in the prayer of process, as it ought to have been.

March 12.—*Mr. Bilton* now applied to the Court, and contended, that it was sufficient that such prayer was contained in the prayer for relief.

Mr. Romilly, *contrà*, for the six clerks, contended, that such a rule would impose additional trouble and great inconvenience on the clerks in court, who would have to look through the prayer of every bill, to find out who were the defendants.

March 14.—WIGRAM, V.C. did not see any sufficient reason why such prayer should be inserted in the prayer of process; but suggested that *Mr. Romilly* should make an application to the Lord Chancellor.

March 16.—*Mr. Romilly* made the application to the Lord Chancellor, who ordered that the prayer that "the defendants being served with a copy might be bound," should for the time to come be inserted in the prayer of process, but that such rule should not apply to bills already filed.

V.C. }
Jan. 28. } HORE v. BECHER.

Annuity to Married Woman—Released by Husband—Deed void owing to Ignorance of Facts.

*An annuity was granted to trustees for a married woman, secured by a bond from the grantor, and also by the assignment of another annuity paid to the grantor during the life of a Mr. D'Oyley, and by the transfer of a bond and policy of assurance on the life of Mr. D'Oyley for 700*l.* securing that annuity. Mr. D'Oyley died, and upon the subsequent death of the grantor, it was supposed that the 700*l.* had been received by him, and applied to his own use. Upon this understanding a deed was executed in 1819, by which the personal representative of the grantor was released from all claims in respect of the annuity by the grantee and her husband in consideration of 500*l.* It was afterwards discovered, that, unknown to the parties, the 700*l.* had been paid into Messrs. Hammersley's bank, and the interest had been accumulated. Upon a bill filed to ascertain the rights of the parties, it was held, that the release of 1819 was inoperative, and the 700*l.* still remained impressed with the trusts of the original security.*

The bill stated, that on the 4th of May 1813, Robert Becher executed a bond to Alexander Fraser and John Becher, to secure the payment during the life of Mary Ann Dickenson, afterwards Mrs. Turton, and now Mrs. Wood, of an annuity of 100*l.*; that by an indenture of even date with the bond, the said Robert Becher, for the purpose of better securing the said annuity of 100*l.* to Mary Ann Wood, did transfer to Alexander Fraser and John Becher a certain annuity of 120*l.*, to be paid to him during the life of Mr. D'Oyley, which he had purchased from the said Mr. D'Oyley at the sum of 660*l.*, and which was secured by the bond of the said Mr. D'Oyley, together with a policy of assurance for the sum of 700*l.*; that Robert Becher regularly paid the annuity to Mary A. Wood, till his death in 1819, which happened on his voyage home from India, and had also paid a further sum of 40*l.* a year, by way of maintenance for the first child of the said M. A. Wood;

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that Richard Becher became the sole legal personal representative of the said Robert Becher; that by an indenture of the 24th of August 1819, it was recited, that the said Robert Becher, after the death of Matthias D'Oyley, which happened in 1817, and on whose life the said annuity of 120*l.* was secured, and on whose death the said policy of assurance for 700*l.* became payable, "had received and converted to his own use the said sum of 700*l.*, which was actually paid by the said insurance company to him, without any knowledge of the said assignment." And it was further recited, "that since the death of the said Robert Becher, the said annuity of 100*l.*, and the annual payment of 40*l.*, had been in arrear, and that for the recovery of such arrears, and for enforcing a further payment of the said sums of money, John Turton and Mary Ann his wife, now Mrs. Wood, had threatened to institute proceedings at law and in equity against the said Richard Becher, as the personal representative of the said Robert Becher, and against John Becher and Alexander Fraser, as the trustees of the said annuity and policy of assurance; and that the said several parties to the deed had lately come to a compromise of their differences, and that it had been agreed, that upon payment of the sum of 510*l.* to John Turton and Mary Ann his wife, no proceedings at law or in equity should be instituted, but that the same annuity of 100*l.* and the said annual sum of 40*l.* should absolutely cease, and be, together with all arrears thereof, released and extinguished, and the said bond for securing the said annuity of 100*l.* be delivered up to be cancelled; and that the said John Turton and Mary Ann his wife, now Mary Ann Wood, should release and discharge the said Alexander Fraser and John Becher, and the said Richard Becher, and also the assets of Robert Becher, from the said sum of 700*l.*, secured upon the said policy of assurance, and all arrears and future payments of the said annuity of 100*l.*, and of the said 40*l.*" It was then witnessed, that in pursuance of the agreement, and in consideration of 500*l.* to John Turton and Mary Ann his wife, paid by John Becher, John Turton for himself and wife released the said John Becher and Alexander Fraser, and Richard Becher, and the estate and effects of Robert Becher, from

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the sum of 100*l.*, and all arrears and future payments thereof, and from the bond and the annual sum of 40*l.*, and all arrears thereof, and from the 700*l.* secured upon the policy of insurance.

The bill then stated, that in consequence of the death, in 1840, of Charles Hammersley, the only surviving partner in the banking-house of Hammersley & Co., the plaintiff, by accident, discovered that there was an account standing in the books of the said firm of Hammersley & Co., in the names of Alexander Fraser and John Becher, which led to the discovery that M. D'Oyley died in 1816, and the sum of 700*l.*, so secured by the said policy of assurance, was paid by the Pelican Insurance Company to Hugh Hammersley, one of the partners in the firm, on behalf of Robert Becher, and that two exchequer bills for the amount were deposited in the said bank, and that an account had been opened, and that the interest on the same bills had been received up to the death of the said Charles Hammersley in 1840, and that the accumulated interest amounted to 490*l.* 12*s.* 9*d.* That the plaintiff, James Hore, the sole executor of Alexander Fraser, who survived his co-trustee John Becher, had received from the representatives of Charles Hammersley the two exchequer bills, and also a dividend of 10*s.* in the pound, upon the sum of 490*l.* 12*s.* 9*d.*, the said Charles Hammersley having died insolvent; and a further dividend would be received. That Richard Becher claimed to be entitled to the whole of the said trust property, by virtue of the said indenture of the 24th of August 1819, but that Mary Ann Wood (who, since the decease of John Turton, had intermarried with Samuel Wood) claimed to be entitled to the said trust property, in discharge of the arrears of her said annuity. That the plaintiff was desirous the said property should be disposed of under the direction of the Court. John Turton died insolvent, without leaving any personal representative. The bill prayed, that the interests of the parties might be ascertained and declared, and that the exchequer bills and the interest thereof might be paid and applied by the direction of the Court; and that the plaintiff might be indemnified in the payment or disposal thereof; and that, if necessary, the trusts of the deed of May 1813 might be executed,

or new trustees thereof appointed, under the direction of the Court.

Mr. G. Lake Russell, for the plaintiff, said, that the facts were admitted on both sides, and the plaintiff would submit to the decision of the Court.

Mr. Bethell and *Mr. Hislop Clarke*, for the representative of Robert Becher, contended, that Mr. Turton, the husband of the annuitant, had full power to release any interest which his wife had: that by the deed of August 1840, all such interest was effectually disposed of, at a fair sum, for the purpose of putting an end to the disputes between the parties. There was no allegation that 500*l.*, the consideration for such release, was not an adequate sum for the purchase of the annuity; and the representatives of Robert Becher were entitled to the 700*l.* and interest.

Mr. Stuart and *Mr. Palmer*, for Mr. and Mrs. Wood, said—The only question was, whether this was a valid release for a longer period than the life of the husband. The case of *Stiffe v. Everitt* (1) appeared to decide this point, that where a feme covert is entitled for life, but not for her separate use, to the interest of a fund which is so circumstanced that the husband is unable to reduce it into possession, it is impossible for the husband and wife to make such a disposition of it during coverture, as to bind the wife surviving, in respect of the subsequently accruing income.

[The VICE CHANCELLOR.—That was a question of assignment. There is a difference between an assignment and a release: the question there was, whether the husband could pass that right in a chose in action which should survive to the wife after the death of the husband; but here the question is, what is the effect of a release?]

It was said, that the law of the Court was settled, that a chose in action could not be assigned beyond the life of the husband; and a note in the case of *Stiffe v. Everitt* (2), taken from *Com. Dig.* 'Baron & Feme,' (K.) confirms this view of the case, as regards a release. "If the wife has an annuity for life, a release by the husband does not bind his wife if she survives—*Moore*, 522: and it never has been suggested, except

(1) 1 Myl. & Cr. 37; s. c. 5 Law J. Rep. (N.S.) Chanc. 138.

(2) 1 Myl. & Cr. 41.

in the argument in *Perdue v. Jackson*, that the principle does not apply to a release—*Honner v. Morton* (3).” The effect of this recital is, that all the security for the annuity was spent and gone. If they had known that the 700*l.* was still in Hammersley’s bank, it could not have been disposed of in this manner. This deed could never operate as a release of the annuity; it proceeds on the acknowledgment of the fact, that the security was gone, whereas, unknown to the parties, it was still existing; and where a party in ignorance of his rights executes an instrument, disposing of his property, that instrument is not binding—*McCarthy v. Decaix* (4.)

The VICE CHANCELLOR.—I have read through the deed, to see what effect it was intended to have, and it appears in form to be a release of the bond, so far as it could be released; but that is not material. It is, however, material that the law should be understood clearly upon this point. If any thing is secured by bond or otherwise, to a woman who afterwards marries, the husband may then release the security. As to the case in *Moore*, I do not remember in what form the annuity was there given; but if it were an annuity charged on land, the husband could not have released it without the consent of his wife; but no doubt the husband might have released it if secured by a common bond. I think the case might be considered with reference to the real facts; and it appears by the recital, that “whereas Robert Becher received and converted to his own use the sum of 700*l.*, which was actually paid by the said insurance company to him, without any knowledge of the assignment.” It then turned out that that was an error in fact. I have no doubt but this deed of August 1819 is inoperative. It is quite plain from the course of proceeding between the parties, that they could not have entered into that deed, if they had been aware that that sum was in existence; the 700*l.*, therefore, remains impressed with the trusts of the deed of 1813.

Declare—That the deed of August 1819, under the circumstances, is inoperative: that

the produce of the exchequer bills and dividends remains impressed with the trusts of the original security for securing the annuity to Mrs. Wood.

L.C.
Nov. 20, 1841. } SWAN v. BOWDEN.
Feb. 16, 1842. }

Will—Construction—Vested Interests—“Heirs.”

A. bequeathed to trustees certain leasehold property, in trust, to pay the rents to B. for life, and after B’s death, A. gave the leaseholds to the heirs and children of the body of B, lawfully begotten, whether males or females, equally between them, for all the residue of the term of years that should remain unexpired thereon at B’s death. B. had ten children, some of whom died during her lifetime, and others survived her:—Held, that the respective personal representatives of the children who pre-deceased B, took equal shares in the leaseholds with the children who survived her.

The word “heirs” held to be equivalent to children.

Conquest Jones, by his will, dated the 1st of November 1773, bequeathed as follows:—“Whereas I stand possessed of two leasehold houses and premises thereunto belonging, in Newman Street, by Oxford Street, No. 5 on the east side, and No. 79 on the west side of the said street. And whereas I stand possessed of two leasehold houses in Glanville Street, Nos. 20 and 21 on the west side thereof, in the possession of Archibald Lindsey and Ann Drewett. And whereas I stand possessed of three more leasehold houses, one in the possession of Robert Timbrell, coffee-man, No. —, one in the possession of Mary Spinnage, No. —, and one in the possession of W. Pringle, Esq., No. —, all well known to be mine, all which said seven leasehold houses I give to my loving friends, Mr. John Hobcraft, sen. and Mr. John Hobcraft, jun., for all the remainder of the terms of years which shall be to come and unexpired at my death, in trust for my niece Martha Rooke, daughter of my brother Richard Jones, and I give her the rents and profits thereof during her

(3) 3 Russ. 65.

(4) 2 Russ. & Myl. 614.

life, not subject to the controul or the debts of any husband she has, or shall intermarry with ; and after the death of my niece Martha Rooke, my will is, that the trustees above named shall still stand possessed, in trust, of all the rents and profits of all the above-mentioned seven houses, in trust for Mary Clarke, the daughter of the said Martha Rooke, not subject to the debts or to the controul of any husband or husbands she, the said Mary Clarke, shall intermarry with ; but after the death of the said Mary Clarke, I give the said seven houses to the heirs and children of the body of the said Mary Clarke, lawfully begotten, whether males or females, equally between them, for all the remainder of the terms of years there shall be to come and unexpired at the time of the death of the said Mary Clarke."

The bill was filed in order to obtain the opinion of the Court on the construction of the will. The executors of the testator's will were Thomas Ingram and Balthazar Burman, who proved the same. Thomas Ingram was the survivor, and John Boden and George Law were his executors. Mary Clarke survived her mother Martha Rooke, and married Mr. Delatouche, and afterwards died, leaving two children only surviving her, viz. Mary Ann Wells and Martha Maria Thornley, but Mrs. Delatouche had eight other children, all of whom died in her lifetime: two of those deceased children left issue, who were living, but the others died without issue. The question was, whether Mrs. Wells and Mrs. Thornley, as the children of Mrs. Delatouche, who survived her, took the property between them, or whether all Mrs. Delatouche's children took vested interests therein, or whether Mrs. Delatouche's grandchildren could claim with Mrs. Wells and Mrs. Thornley, under the word "children," an interest therein. The plaintiff was the personal representative of the eight children, who died during the lifetime of Mrs. Delatouche. The defendants to the bill were the respective personal representatives of the two surviving children, and the two executors of the testator.

Mr. Richards and *Mr. Renshaw*, for the plaintiff, cited—

Devisme v. Mello, 1 Bro. C.C. 537.
Ayton v. Ayton, 1 Cox, 327.

Hallifax v. Wilson, 16 Ves. 168.
Ellison v. Airey, 1 Ves. sen. 111.
Wilson v. Vansittart, Ambl. 562.
Crawford v. Trotter, 4 Madd. 361.
Law v. Davis, 1 Ves. jun. 145, cited from Reg. Book.
Jacobs v. Amyatt, 4 Bro. 542.
Fearns v. Young, 10 Ves. 184.
Crump v. Baker, 18 Ibid. 285.
Ford v. Rawlins, 1 Sim. & Stu. 328 ;
 s. c. 1 Law J. Rep. Chanc. 170.

Mr. Bethell and *Mr. Reynolds*, for the personal representatives of the two surviving children, cited—

Godfrey v. Davis, 6 Ves. 43.
Batsford v. Kebbell, 3 Ibid. 363.
Sansbury v. Read, 12 Ibid. 75.
Weld v. Bradbury, 2 Vern. 705.

Mr. Willcock and *Mr. Law* appeared for the other defendants.

The LORD CHANCELLOR, after stating the facts, proceeded as follows :—The question is, what interest the children of Mrs. Delatouche took under the will. The general rule is, that wherever property of the description bequeathed by the will in this case, is given in trust to pay the rents to a party for life, and after her decease to pay over or divide the property between the children of the tenant for life, the children of the tenant for life take vested interests in the property, which will pass to their legal personal representatives. In *Devisme v. Mello*, the personal representative of Sophia Devisme, who died during the lifetime of her uncle Lewis Devisme, the tenant for life of certain stock, was held entitled to share in the stock equally with the brothers and sisters of Sophia Devisme, who survived Lewis Devisme. The exceptions to this rule are, where it is manifest, from the will, that it was not the testator's intention that the children should take a vested interest, as was the case in *Weld v. Bradbury*, cited in the course of the argument on behalf of the two surviving children, where Lord Hardwicke was of opinion, on looking at the will, that the interest of the children of J. S. and J. N. was only contingent in its nature, and that those children only of J. S. and J. N. would take, who were living at their deaths. In the case of *Batsford v.*

Kebbell, where a sum of public stock was given to trustees, in trust to pay the dividends thereof to a legatee, till he should attain the age of thirty-two years, and on his attaining that age to transfer the capital to him, the Court held, that the party did not take a vested interest, because there was only a direction given by the will to the trustees, to transfer the capital on the legatee's attaining thirty-two years of age, and the legatee died under that age. In the case before me, there is nothing indicative of an intention on the part of the testator, that the shares of the children in the leasehold property, should not vest immediately; and I am therefore of opinion, that the shares of such of the children as died during the lifetime of the tenant for life passed to their personal representatives. During the argument, a question arose, as to what was the meaning of the word "heirs," which is found in that part of the will, the subject of discussion before me; and after perusing the case of *Law v. Davis*, I consider myself bound to hold that word to be equivalent to "children."

K. BRUCE, V.C. }
Feb. 19. } HORLOCK v. SMITH.

Constructive Possession.

A receiver was appointed by the Court, of an estate which had been mortgaged to A. By a decree, dated in December 1827, the receiver was ordered to be discharged, and pay the balance in his hands to A. The receiver continued to receive the rents until 1830, but paid them over to A, and after that time the rents were paid by the tenants to A:—Held, that the possession of the receiver, after December 1827, was the possession of A; and that therefore A. had been in possession from that time.

A mortgage was made to Jane Priestly, of an estate for 1,000*l*. In 1821, a receiver was appointed by the Court of this estate, and between 1821 and 1827, no interest was paid to her in respect of the mortgage money. In December 1827, a decree was made in several causes, affecting this and other property, to one of which J. Priestly was a party, declaring that she was the first incumbrancer on this estate, and directing, among

other things, that her principal and interest should be ascertained, and that the receiver should be discharged, pass his accounts, and pay the balance in his hands to her; and that on such payment being made, his recognizances should be discharged.

It appeared by the report of the Master, made in pursuance of this decree, that the receiver had paid the balance accordingly, but that he had continued to receive the rents until Lady-day, 1830, which he paid to J. Priestly; and that after that time the rents had been paid by the tenants to her. Upon the causes coming on for further directions in 1837, before the Lord Chancellor, on the suggestion that the accounts ought to be taken with annual rests against Jane Priestly, on the ground that there was no arrear of interest at the time she entered into possession of the estate, the Master was directed to inquire when Jane Priestly entered into possession of the estate. The Master, in pursuance of this direction, found that she had entered into possession in December 1827.

An exception was taken to the report on this point.

Mr. Cooper and Mr. Keene, for the exception, argued, first, that as the facts stated in the report were before the Lord Chancellor, it must be presumed, that his Lordship had concluded the question, and decided that such holding of the receiver was not the possession of the mortgagee; and, secondly, independently of such authority, the possession of the receiver could not be considered as that of the mortgagee. They cited *Thomas v. Brigstocke* (1).

Mr. Spence and Mr. Calvert, for the report, were not called on.

KNIGHT BRUCE, V.C. — The common meaning of the expression, and the meaning in this decree, of a person being in possession, is, when rents are paid to him, or by his order, or for his use. Jane Priestly has received the rents from December 1827, and, therefore, has been in possession from that time.

(1) 4 Russ. 64.

K. BRUCE, V.C. }
Feb. 25. } LOVELL v. YATES.

Costs.

Where a bill has been dismissed with costs, the plaintiff is entitled to the costs of a motion for the production of documents, which had been rendered necessary by the default of the defendant.

The bill in this case was dismissed with costs. It appeared, that the plaintiff had moved, upon the answer of the defendant, for documents admitted by him to be in his possession, and that the defendant having subsequently admitted other documents to be in his possession not mentioned before, the plaintiff had, on this admission, made a second motion for the production of these last-mentioned documents.

Mr. Russell, for the defendant, submitted, that the costs of this second motion were costs in the cause ; but—

KNIGHT BRUCE, V.C. said, that as this second motion had been rendered necessary by the default of the defendant, the costs of it ought to fall upon him, and be deducted from the costs that the plaintiff had to pay him.

K. BRUCE, V.C. }
March 3. } CALDICOTT v. CALDICOTT.

Will—Residue—Tenant for Life.

A testator bequeathed the residue of his personal estate to his executors, to be by them, from time to time, as they should think best, turned into money, for the payment of his debts and legacies ; and, subject thereto, he directed them, from time to time, to lay out and invest the same, with all accumulating produce, in the purchase of lands to be situated at or near N ; and he declared that such purchased premises should be conveyed to A. for life, with remainders over ; and he further declared his will to be, that the interest and produce of his said personal estate, which should from time to time arise and be made, until such investment, should be paid to the same persons :—Held, first, that A. was not entitled to the interest of the residue of the testator's estate in specie as it stood at his

death, and that the whole residue ought to be placed in a condition of secure investment ; secondly, that A. was entitled to the interest from the death of the testator, on the value of such items of the residue as were not in a proper state of investment at the death of the testator, either at such death, or a year after ; such value to be computed by the Master ; and was also entitled to the interest on the items which were in a proper state of investment, from the death of the testator.

An inquiry was directed whether canal shares were a proper investment. Bank stock, fire office and turnpike shares, and mortgages of turnpike tolls, were ordered to be sold without inquiry.

William Caldicott devised his real estate to his nephew G. M. Caldicott, for life, with divers limitations over. After various bequests and directions, the will proceeded as follows :—

"As to the residue of my personal estate, I give the same to my executors, in trust, to be by them, from time to time, as they shall think best, turned into monies, for the payment of my debts and legacies, as well those given by this my will, as those which I may hereafter give by any codicil or codicils ; and, subject thereto, I direct my said executors and trustees from time to time to lay out and invest the same, with all accumulating produce, in the purchase of other lands and hereditaments, to be situated as conveniently as may be to my said estates, in the parish of Newbolt-upon-Avon ; and my will is, that all such purchased premises shall be conveyed to the same uses, and under the same limitations and powers, or as near thereto as the then state of circumstances will admit, as my present lands and hereditaments are limited to ; and my will further is, that the interest and produce of my said personal estate, which shall from time to time arise and be made, before and until the said monies shall be invested, shall be paid to the person or persons who would be entitled, under the trusts of this my will, to the rents and profits of the said lands and hereditaments, if actually purchased, and as an addition thereto."

The testator died in October 1839. The bill was filed by G. M. Caldicott, for the administration of the personal estate, and a decree directing the usual accounts was

taken. The Master found, by his report, that the residue of the personal estate of the testator consisted of canal shares, mortgages of freeholds, bank stock, turnpike shares, mortgages of turnpike tolls, and shares in the County Fire Office. The cause now came on on further directions. The only point in dispute was the nature of the benefit intended for the plaintiff out of the residue of the personal estate.

Mr. Koe and Mr. James Parker, for the plaintiff.—The testator intended, that when a favourable opportunity occurred for the purchase of lands, the items constituting the residue should be converted into money for that purpose; but not before. This was the only conversion he contemplated or intended; and his meaning was, that, until such investment was made, the tenant for life should enjoy the interest of the residue in specie.

Collins v. Collins, 2 Myl. & K. 703.

Bethune v. Kennedy, 1 Myl. & Cr. 114.

Pickering v. Pickering, 4 Myl. & Cr. 289; s. c. 8 Law J. Rep. (n.s.)

Chanc. 336.

Goodenough v. Tremamondo, 2 Beav. 512.

At any rate, the plaintiff is entitled to the income of the residue, as it stood at the death of the testator, from that time until an investment in securities recognized by the Court, or until the end of a year.

Angerstein v. Martin, Turn. & Russ.

234; s. c. 2 Law J. Rep. Chanc. 88.

Douglas v. Congreve, 1 Keen, 410; s. c.

6 Law J. Rep. (n.s.) Chanc. 51.

The report of the case of *Angerstein v. Martin* has been compared with the registrar's book, and found to agree with it. There, the tenant for life had the interest of monies invested on Russian securities, from the death of the testator.

Sitwell v. Bernard, 6 Ves. 520.

Gibson v. Bott, 7 Ibid. 89.

Fearn v. Young, 9 Ibid. 549.

La Terriere v. Bulmer, 2 Sim. 18.

Holland v. Hughes, 16 Ves. 111.

Taylor v. Clark, before Wigram, V.C., not yet reported.

were also cited.

Mr. Spence, for the parties interested in the residuary estate, after the death of the tenant for life, was not called upon.

KNIGHT BRUCE, V.C.—It has been contended on the part of the plaintiff, that the

testator has expressed the intention which was gathered from the words in *Bethune v. Kennedy*, *Collins v. Collins*, and *Pickering v. Pickering*, that, though the residue is given in succession to different persons, the ordinary rule should not apply. Of this rule there is no doubt—that where a testator gives a residue, with a series of limitations, without any particular directions, the clear residue must be placed in a condition of secure investment, to be available for all persons interested. The question here is, whether the testator has expressed his intention in so clear a manner, as to warrant the Court in departing from the ordinary rule.—[His Honour here read the part of the will before stated, as to debts and legacies.] The testator has said no more in the first clause than the law would have done for him, and does not denote that he intended to depart from the ordinary line of conduct.—[His Honour read the remainder of the passage of the will given in the statement.] I do not collect here, that the testator intended that the general rules of administration of estates in courts of law, should be departed from. I think, that if I were to hold that the testator intended that the specific personalty should remain in its present state, until laid out in land, I should apply to general expressions pointed and specific directions in a manner that the rules of the court would not justify. I think it would be unsafe to collect from general and common expressions, a particular and extraordinary intention. As to the accumulating produce, *prima facie* I should think it came within the rule in *Sitwell v. Bernard*, that the produce for one year should be accumulated; but when I find it coupled with the expressions that the interest should be paid to the person, &c., I think, putting the two together, there was in this case no intention to depart from the usual administration of estates according to law. I am of opinion, therefore, that the tenant for life ought to be entitled, as from the death of the testator, to the income of such parts of the personal estate as were at his death in such a state of investment as ought to be recognized by this Court; and that with regard to those parts which were not on such investment, the same rule should be applied as was adopted in *Gibson v. Bott*, with regard to the lease, and in *Walker v.*

Shore (1), with regard to the copyholds. The Court is not in a situation to make a final decree, as to the nature of the benefit to be derived by the tenant for life, without further inquiries. Let the Master inquire whether it is fit and proper, and for the benefit of all parties interested in the testator's estate, that the canal shares should remain unconverted until laid out in the purchase of real estate. If not, let them be sold, and let the Master find what was the value of the shares at the death of the testator, and at the end of a year from the testator's death. The same as to the mortgages of freeholds. The bank stock, the turnpike shares, the mortgages of turnpike tolls, and the shares in the fire office, must be sold; and let the Master find what was the value of them respectively, at the death of the testator, and at the end of a year from his death.

K. BRUCE, V.C. } DANIEL v. HARDING.
March 5. }

Practice.—Dismissal of Bill—Costs.

A sole defendant having become the provisional assignee of a sole plaintiff under the Insolvent Debtors Act, bill dismissed with costs, on the defendant undertaking not to obtain them against the plaintiff personally.

The bill in this case was filed by a sole plaintiff against a sole defendant, for the purpose of having a bond delivered up, on the ground of fraud. The defendant put in his answer, and, no evidence having been entered into by the plaintiff, had set down the cause for hearing.

After the cause had been set down, the estate and effects of the plaintiff became vested in the defendant by the common vesting order under the Insolvent Debtors Act (1 & 2 Vict. c. 110. s. 37).

On the cause being called on,—

Mr. Ellison, for the defendant, said, the bill ought to be dismissed with costs.

Mr. G. A. Young, for the plaintiff, submitted that the bill ought to be dismissed without costs, and cited *Wheeler v. Malins* (2).

(1) 19 Ves. 387.
(2) 4 Madd. 171.

KNIGHT BRUCE, V.C. said, the course he should adopt, would be, to dismiss the bill with costs; the defendant undertaking not to obtain the costs from the insolvent plaintiff personally, or otherwise than against his estate in the insolvency.

K. BRUCE, V.C. } DRYDEN v. WALFORD.
March 7. }

Practice.—Revivor—Dismissal of Bill.

Motion by a defendant, that the representatives of a deceased sole plaintiff should revive within a limited time, or that the bill should be dismissed, refused.

Mr. Keene moved, that the personal representatives of the plaintiff, deceased, who had been the sole plaintiff, should revive the suit in a limited time, or that the bill should be dismissed. His Honour having expressed a doubt, whether such an order ought to be made,—

Mr. Chandless (*amicus Curiae*) stated, that the Vice Chancellor of England had refused to make such an order in *Canham v. Vincent* (1); that in *Chawick v. Dimes* (2), such an order had been made after a review of all the authorities by Lord Langdale; and that a fresh application having been made to the Vice Chancellor of England in *Canham v. Vincent*, supported by this authority, his Honour had then made it. That application had been opposed by him, Mr. Chandless.

KNIGHT BRUCE, V.C. said, he conceived such an order to be against the rules of the Court, and that no precedent had been produced, previously to the order of the Master of the Rolls, of such an order on the death of a sole plaintiff. He should decline making the order. An application might be made to the Lord Chancellor.

(1) 8 Sim. 277; s.c. 7 Law J. Rep. (N.S.) Chanc. 267.

(2) See 3 Daniell's Ch. Pr. 305.

WIGRAM, V.C. }
Dec. 14, 15, 18. } FEWSTER v. TURNER.

Vendor and Purchaser—Specific Performance—Compensation—Subsequent Purchaser with Notice—Disclaimer—Costs.

An estate was put up to sale in lots. In the particulars the lots were described respectively as "All that, &c. comprising Lot — in the sale plan." The sale plan, circulated at the auction, represented a well on Lot 4, with a drain and pipe conveying the water from the well through Lot 2. to Lot 1. The plaintiff, the purchaser of Lot 1, filed his bill for specific performance, with compensation for the loss of the water, the vendor having conveyed away the other two lots, without any reservation to the plaintiff of a right to the flow of water from the well:—Held, that the sale plan, accurately describing the existing state of the property, would not carry the case higher than a view of the property by the purchaser. Decree for specific performance, without compensation.

The claim for compensation being the sole cause of the suit, costs were given against the plaintiff.

A subsequent purchaser, with notice of the plaintiff's contract, who had formally abandoned his contract, but had given no notice thereof to the plaintiff, before the bill filed, was made defendant and disclaimed. Bill dismissed as against him "without costs."

On the 7th of September 1837, certain adjoining lands and messuages belonging to the defendant, were put up to sale by public auction in several lots. The lot in question was described in the particulars as "All that capital public-house, called the Acorn Inn, &c. with the field adjoining, comprising Lot 1. upon the sale plan." In the conditions of sale there was the usual clause as to compensation. The plaintiff attended at the sale, became the purchaser of Lot 1, paid the deposit, and signed the memorandum of agreement.

The purchaser of Lot 1. filed his bill, alleging, that at the time of the auction the defendant caused to be circulated, with the particulars of sale, a ground plan of the estate, which was to be sold in lots; that in Lot 4, as represented on the plan, was a well, and in Lot 2. a reservoir, and a line drawn from the well to the reservoir repre-

sented a stone drain, which conveyed the water from the well to the reservoir, and another line drawn from the reservoir to the Acorn Inn, representing a leaden pipe which conveyed the water from the reservoir to the kitchen of the inn; that in November 1837, the plaintiff obtained an abstract of the title, and in May 1838, caused a draft conveyance to be prepared, and sent to the vendor's solicitor, with a letter to the effect, that it was to be without prejudice to the plaintiff's title; that shortly afterwards the plaintiff discovered, that the vendor was about to convey Lot 4. to another purchaser, without any reservation of the right of water to the plaintiff from the well, as described in the plan under which the plaintiff purchased; that notwithstanding the plaintiff's remonstrances, the vendor did shortly afterwards convey away Lot 4. without any such reservation; that pending these discussions, the vendor contracted to sell the same Lot 1. to the Hemingways, who were made defendants to the bill. The bill prayed for specific performance, with compensation for the loss of the water. The answer of the defendant, the vendor, admitted the sale, and that some plan with such lines upon it was distributed at the time of the sale, and that such sale plan was a map or plan of the lands, with their rights, members, and appurtenances; that in the conveyances of the other lots, he did not mean to reserve any right of water to the plaintiff; that he was always ready to convey the premises according to the contract; and that he refused to comply with the plaintiff's demand under the circumstances mentioned. He also admitted the subsequent contract with the Hemingways. No evidence was entered into on the part of the plaintiff.

Mr. S. Sharpe and Mr. B. Parry, for the plaintiff, contended, that the facts disclosed in the bill and answer, entitled the plaintiff to the decree prayed.

Mr. Wakefield for the defendant, the vendor.—The particulars contain nothing with respect to the supply of water. The plan was merely referred to as shewing the extent of Lot 1, and the existing state of the premises.

[WIGRAM, V.C.—If your client had remained owner of the other lots, would a court of equity have allowed you to stop the supply of water?]

Suppose a sale of some of the great brew-

eries in London, whose premises are often separated by a street, and yet are connected with pipes to supply water from one side to the other: could the purchaser of one lot prevent the communication being cut off? There must be something in the agreement to that effect. It is not alleged, that the draft conveyance contained any covenant to this effect. It is not shewn, that it is essential to the house. In *Dyer v. Hargrave* (1), it is doubted, whether the Court ought to compel compensation for that which hardly admits of pecuniary value.

Mr. Steere, for the Hemingways.—In May 1838, all the other purchases were concluded, and it was not till the 19th of June following, that these defendants entered into their contract with the vendor; they had no notice of the plaintiff's suit till the 15th of January 1839; on the 18th of March they rescinded their contract with the vendor, and on the 23rd of March, five days afterwards, the amended bill was filed.

[WIGRAM, V.C.—You do not say in your answer, that you believed the plaintiff's contract to have been rescinded.]

As the plaintiff did not give these defendants notice of his suit, the Court will order him to pay their costs. By notice of the suit, he might have protected himself against any conveyance afterwards made—*Landon v. Morris* (2).

[WIGRAM, V.C.—You should have given notice that you had rescinded the contract.]

Mr. S. Sharpe, in reply.—The Hemingways purchased with full notice of the plaintiff's contract, and without any inquiry as to whether it was rescinded or not. They gave the plaintiff no notice of their contract having been rescinded. As their improper conduct made them necessary parties, they ought to pay the costs occasioned by it. As to the main question. By the reference, the plan was incorporated into, and became part of the particulars. The fact of the existence of the water, might have been known from inspection, but the answer of the defendant shews, that the sale plan was a map of "the rights, members, and appurtenances." As the defendant has put it out of his power to fulfil his contract, the plaintiff has a right to compensation. The value of it as an ease-

ment is shewn by the fact of its being specified in the plan. As to the lapse of time, it was not necessary for the plaintiff to file a bill, till the purchaser had conveyed away the other lots without any reservation; it then became a subject of money compensation, as a diminution of the thing sold.

WIGRAM, V.C.—The question is, whether there was an implied contract to assure the plaintiff the water. If it is appurtenant to the house, the other purchasers cannot disturb the right. It seems to me nothing more than an agreement to sell the land as it then stood; and at the same time an intention was expressed to convey the adjoining property to other persons. It is similar in many respects to the case of *Squire v. Campbell* (3), where Lord Cottenham decided there was no contract.

Dec. 18.—WIGRAM, V.C.—Certain property belonging to the vendor was put up to sale by public auction, in several lots. The plaintiff attended the sale, and became the purchaser of Lot 1. He was satisfied with the title, and prepared a draft conveyance on that footing. The question is, whether the contract is to be performed *simpliciter* by a conveyance from the vendor, or whether the purchaser is entitled to compensation in respect of that part of the property, which I shall now mention. There were the usual particulars and conditions of sale, in which the lot purchased was described as "Lot 1. in the sale plan." That plan was not produced in evidence; but a passage was read from the answer, which, taken in connexion with the bill, made it sufficiently evident what it was. That sale plan had this upon it. Upon one of the lots, not purchased by the plaintiff, was a well; upon another, was a reservoir; then upon the sale plan, a line was drawn connecting the well with the reservoir, and another line connecting the reservoir with the Acorn Inn. It is admitted, that the first-mentioned line denoted a stone drain, by which the water was conveyed to the reservoir; and that the other line represented a pipe running from the reservoir to the kitchen of the inn. Since this took place, the vendor has conveyed the other lots to the respective pur-

(1) 10 Ves. 508.

(2) 5 Sim. 247; s. c. 2 Law J. Rep. (N.S.) Chanc. 35.

(3) 1 Myl. & Cr. 459; s. c. 6 Law J. Rep. (N.S.) Chanc. 41.

chasers, and, in their conveyances, had not taken any means to secure to the plaintiff the flow of water. Under these circumstances, the plaintiff says, that the effect of the sale plan was to represent to him, that the water supplied by the stone drain and pipe to the inn, was part of his lot; and that the vendor, having conveyed away the other property, without any reservation, has damnified him by the loss of the use of the water, and that therefore he is entitled to compensation. If, in this case, it was material to advert to the sale plan, I should require more information than I now have. There is no evidence that the plaintiff ever saw the sale plan. There is direct evidence that the plaintiff, shortly after his purchase, had an abstract of title, and prepared a draft conveyance, on the footing of his being satisfied with the title. That draft is not produced in evidence, so that I have no means of knowing, whether upon the draft, he claimed any such reservation as that upon which he now insists; though I do not mean to say that any omission on his part to specify that, would vary the contract. But in a case where, to say the least of it, the terms of the contract are extremely equivocal, if the plaintiff has gone on from September 1837 to March 1838, without making any such claim as he now makes by his bill, and has allowed the vendor to convey the rest of the property to other persons, with an indirect intimation on his part that he did not mean to claim any such reservation, the Court will leave him to his other remedies, independently of his right to compensation. For nothing would be more unjust, after the vendor has put it out of his power, by conveyances, to grant it himself, to allow a purchaser to make this claim; which, if the contract included it, would be binding on the other purchasers equally with the vendor. The Court would not, after that, give the plaintiff the relief asked in respect of compensation. But I am not called upon to decide that point, because, in my view of the case, there is no such contract as that set up. I observe, first, that the sale plan does not, in the slightest degree, *vary* the contract. Where the sale plan is different from the actual state of the property, it is extremely material to consider, whether the purchaser was misled by the fact; but, where the sale plan accurately represents the property,

which in this case it does, can the sale plan carry the case further than a *view* of the property itself would? I am only, therefore, called upon to assume, that which the plaintiff has clearly a right to have assumed, that the property was advertised to be sold to him as it stood at the time. The question is then, assuming that the plaintiff went to the property and viewed it, and saw the pipe, &c., would he in that case be entitled to the reservation he claims? The state of the case is this: a person has property, consisting, partly of the Acorn Inn, and partly of other property; he has a pipe leading from one part of the property to the inn, for the use of the kitchen; he advertises the property for sale in lots, which is a direct intimation to the purchaser, that if he does not purchase the other lots, they will go into the hands of other persons, liable to be dealt with by them, as any person may deal with property in which he has acquired an absolute ownership. All the vendor undertook was to sell the property; but with notice, that the rest of the property would no longer remain in his hands. Suppose this altogether a natural flow of water. A person then agrees to sell property, and sells it with the running water there; but makes no stipulation that he will enter into a covenant, that the other purchasers shall not disturb the natural flow of the water; the plaintiff purchasing the property with such natural flow of water, is left to assert his right against the other purchasers, if the flow of water is an easement to the property. How does the case differ if it is an artificial stream? The vendor says, "I sell you the property as it is. Other persons will hold one part, and you the other;" the plaintiff must be left to assert his right against the other purchasers. It is not for the vendor himself to take any other precaution than that of conveying to the purchaser that which he contracts to sell. I have less hesitation in coming to this conclusion, because, if the effect of the contract really is to give the plaintiff the right he claims, the other purchasers who have purchased on the footing of the sale plan, will have purchased with *notice* of the plaintiff's contract, and are as much liable to the purchaser as the vendor himself, if he had remained owner of the other lots; for, in point of fact, they all purchased upon the same footing, and

with full notice of the stipulations. The plaintiff cannot be damnified by my decision; but the vendor would be seriously damnified by being called upon, after he has conveyed away the property to persons, subject to this equity, to make compensation. If my opinion were less decided than it is, I could not give the relief in the form in which the case now stands, because there is not a particle of evidence to shew that the well gives a supply of water naturally without manual labour; it might then assimilate itself to the case of a natural stream. But most likely a pump and manual labour are necessary; and then nothing could be more extravagant than to suppose that when the vendor sold the property, he intended the other purchasers, by manual labour, to supply the inn with water from the well, or that the purchaser of this lot should have power to enter the other property and pump for himself. I am not at all informed, whether the plaintiff would derive any essential benefit from it. A supply of water is indeed most essential to an inn; but there is no evidence to shew that the house is not already abundantly supplied with water. In a question of compensation, and after a conveyance of the rest of the property, the damage sustained by the plaintiff is a material consideration. All these facts might have been brought before the Court if the plaintiff had had a substantial case. The utmost I could have done, under the most favourable view of the case, would have been to refer it to the Master to inquire whether the property had sustained material damage. But parties, who bring a case before the Court in this way, are not entitled to any indulgence. Upon these grounds, and also because I shall not do the plaintiff any injury, I shall refuse that part of the prayer of the bill. The prayer for specific performance is not opposed. The only other question is as to costs. The Hemingways were made defendants to this bill. With full notice of a subsisting contract between Fewster and Turner, the Hemingways enter into a contract with Turner to purchase this same property, and they do not suggest in their answer, that at the time of their contract they really believed the plaintiff had abandoned his contract. If the plaintiff had filed his bill against Turner alone, he would have been liable to another suit by the

Hemingways. The question is, was the plaintiff justified in making them defendants? I was pressed with the argument that the Hemingways had formally abandoned their contract before the bill was filed. If they had given notice of that fact to the plaintiff, I should have little hesitation in making the plaintiff pay them their costs; but in the absence of that notice, the plaintiff was not bound to infer any change of circumstances; therefore the bill must be dismissed as against the Hemingways without costs. As to the costs of the suit generally; the bill seeks specific performance with compensation. The answer distinctly admits the right to specific performance without compensation. As the plaintiff is not entitled to compensation, which question was the only reason of the bill being filed, I think I ought to give costs against the plaintiff.

WIGRAM, V.C. }
Dec. 15, 16, 17, 24. } BLAKESLY v. WIELDON.

Vendor and Purchaser—Specific Performance—Coal Mines—Covenants.

A. contracts with B. for the purchase of all the coal under certain lands, at the rate of 350l. per acre, to be paid by annual instalments of 350l. till the whole should be got; and it was further agreed, that, if more than an acre should be got in any one year, an additional sum should be paid for such excess in the proportion of 350l. to the acre:—Held, that there was an implied contract for a covenant in the conveyance, enabling B. and his agents to enter the mines, for the purpose of inspecting and measuring the quantity got in each year.

This was a suit for the specific performance of an agreement, dated the 6th of April 1838, by which the plaintiff, who was the owner of twelve acres of land, agreed to sell, and the defendant agreed to purchase, the coal under the same, at the rate of 350l. per acre, surface measure, to be paid by yearly instalments of 350l., until the whole should be worked out; and it was further agreed, that if more than one surface acre should be got in any one year, then an additional sum should be paid for such excess, in the proportion of 350l. to the acre. The defendant

accepted the title, and began to work the mines; and afterwards a dispute arose as to the form of the conveyance, the plaintiffs insisting upon a right to have a covenant inserted, empowering him and his agents to enter the mines to see and measure the quantity of coal worked and got in each year. The evidence, on the part of the plaintiffs was to the effect, that whenever the amount of the payments depended on the amount of coal got, such a covenant was proper and usual. The evidence, on the part of the defendant was, that such a covenant was only usual in the case of royalties reserved, but not in the case of a sale by surface measure.

Mr. Sutton Sharpe and Mr. James Parker, for the plaintiffs.—This is, in effect, a sale by royalty. The purchase-money being to be paid by instalments, according to the quantity worked, is in the nature of a royalty; such a right of entry is, therefore, equally necessary, as the plaintiff has no other means of judging of the surface quantity got; and the covenant insisted on is both reasonable and customary.

Mr. Boteler and Mr. Cockerell, for the defendant, contended, that there was no such custom in sales of mines like the present; but that if the Court should decide the contrary, the right of entry ought to be limited to once in every twelve months.

Mr. S. Sharpe, in reply.—It is the same principle of law which gives a landlord a right of entry to view the state of a house or lands, and he is not obliged to trust to the representations which the tenant may choose to make.

Dec. 17. — WIGRAM, V.C.—I will not finally dispose of this case till I have had an opportunity of examining some cases, which have a close bearing on the question, and till I have read the evidence. I shall also take time to word the decree, if I should direct any covenant to be inserted, and the question of costs may then be disposed of. The general rule is, as has been argued, that where a person contracts with another in respect to property, there is an implied contract for such covenants as shall give security for the due performance of the contract. If the property is leased at royalty rent, there can be no question as to what the covenants must be. Custom will give the lessor a right

to inspect, and such a covenant must be inserted. There is no positive law on the subject; but these covenants are usual, because they are reasonable. The very fact that all persons, without objection, do submit to the usual clauses of entry, to see what quantity is got, is conclusive evidence; they submit, because they are usual and reasonable. Where the price of the coal is not paid down, and the amount of the instalments depends upon the amount got, such a covenant is necessary. With that certain guide before me, I shall compare the admitted cases with that before me. There are two. The vendor contracts for two things; a right of entry to see the quantity got; and that the coal is worked in a workman-like manner. In the present case, there is no contract as to the mode of working, but only as to the quantity got. How can I, in the absence of evidence to the contrary, infer that the covenant for entry is inapplicable, because there is here only one object, viz. to see the "quantity" got? I should scarcely have hesitated in coming to the conclusion, that a covenant enabling a party to enter for the sole purpose of ascertaining whether more than an acre was got, was a reasonable covenant; even if I had nothing before me but the fact, that covenants of an analogous nature, but more extensive, are inserted where royalties are reserved. In this case, the issue has been precisely raised, whether there should be such analogous covenant, and each party knew that that was the point to be contested. The plaintiff has examined witnesses, who say positively, that such a covenant is usual where the payments depend upon the quantity. That is so analogous to the other cases, that the mind is prepared to believe the evidence. The evidence on the other side, which was called for the express purpose of negating this case, confirms it in an extraordinary manner. There is no evidence as to absolute sales; but they say, in leases with royalties reserved, such a power is given, and also whenever the price is to be paid in the nature of a royalty. What that means I do not know, except it is when it depends on the quantity got. I shall not decide what is a reasonable covenant in this case; but only declare that in the conveyance to be settled by the Master, there is to be inserted a covenant enabling the plaintiff and his agents, except such persons usually except-

ed, to enter for the sole purpose of seeing whether the quantity of minerals got during the year does or does not exceed one acre. The covenant must be limited in that way to guard against any undue advantage. The case will have to go to the Master with these directions.

Dec. 24.—WIGRAM, V.C.—The general principle of law is, that where a person grants any given thing to another, he impliedly grants whatever is necessary for the enjoyment of it—6 *Litt.* 56, a; 153, a; 3 *Com. Dig.* 58, *Pomfret v. Ricroft* (1), *Senhouse v. Christian* (2). In *Henderson v. Hay* (3), Lord Thurlow held, that common and usual covenants must mean covenants incidental to the lease. Considerable doubt had been thrown upon that case by *Morgan v. Slaughter* (4). But in the subsequent case of *Church v. Brown* (5), Lord Eldon, after great consideration, set up Lord Thurlow's opinion, saying, that it made no difference whether the agreement was for the usual and proper covenants or not; for in every agreement, whether for a lease or sale of a fee simple, there was an implied contract for those covenants. In the case of an agreement for a lease, with a stipulation that the lessee shall keep the premises in repair, the right of entry is always reserved to the landlord. To apply this reasoning to the present case. It is admitted, that where coal-mines are let or sold at or for a royalty, a right of entry is reserved; and that such a covenant is incidental to the contract. The contract for the lease or sale would, in Lord Eldon's language, (15 *Ves.* 263,) carry in *gremio* the right to proper covenants. The present case differs only in this, that the vendor has only an interest in the quantity of coal raised; his right of entry, therefore, must be limited to the necessary protection of his interest. But this case does not rest merely upon legal conclusions, but the evidence of the plaintiff's witnesses leads irresistibly to the same conclusion. There must be a decree for a specific performance of the agreement of the 6th of April 1838, the defendant admitting that he has accepted the

title, and the plaintiff waiving all claim to interest upon the instalments; and let it be referred to the Master to settle a conveyance to carry the agreement into effect in case the parties differ; in settling the conveyance, let the Master insert a clause enabling the plaintiff and his agents, at reasonable times, and giving reasonable notice, to enter the mines in the pleadings mentioned, and to inspect and measure the same, so far as from time to time shall be necessary for the sole purpose of ascertaining whether the quantity of coal which shall or may be gotten in each year, shall exceed one acre of surface measure, and how much, till the whole quantity is gotten, or the whole of the twelve instalments is paid; and in settling such conveyance, let the Master have regard to the clauses usually inserted in sales of coal by royalty.

Costs reserved, with liberty to either party to apply.

V.C. }
Feb. 8. } CAMPBELL v. SCOTT.

Copyright—Piracy—Injunction.

Injunction granted to restrain the publication of a book called The Modern Poets of the 19th Century, containing 32 pages of original biographical notices of forty-three poets, and 758 pages consisting of 10,000 lines of extracts from the writings of those poets, out of which 369 lines were taken from the plaintiff's works, including six whole poems.

This was a motion, on behalf of the plaintiff, that an injunction might be awarded to restrain the defendants, Adam Scott and John Geary, from selling, or exposing for sale, any further copies of the work or volume called *Book of the Poets—The Modern Poets of the 19th Century*, in the pleadings mentioned, or such part or parts thereof as consist or consists of the plaintiff's original compositions, comprised between p. 233 and p. 251, both inclusive, of the same volume, and from printing or publishing the same, or any other of the plaintiff's compositions in any other volumes or works, without the leave of the plaintiff first obtained thereto.

The bill stated, that the copyright in

(1) 1 *Saund.* 321, n.

(2) 1 *Term Rep.* 560.

(3) 3 *Bro. C.C.* 632.

(4) 1 *Esp.* 8.

(5) 15 *Ves.* 268.

certain poems composed by the plaintiff, Thomas Campbell, was still remaining in the plaintiff; that he had, in the year 1840, caused to be printed and published, by Mr. Moxon, a bookseller and publisher, under an agreement, a new edition of his poetical works; that Mr. Moxon had also, by agreement, from time to time printed and sold other editions of his works; that the defendants, Messrs. Scott & Geary, booksellers and publishers, had just printed and published a work, entitled *Book of the Modern Poets of the 19th Century*, and had, without leave of the plaintiff, printed in such book, amongst other things, divers of the said original poems, entirely composed by the plaintiff, and copious selections from others of such poems, all of which were comprised in the said edition of plaintiff's poetical works, published by Mr. Moxon; that several of such poems were amongst the most popular and characteristic of plaintiff's poetical works, and plaintiff's profits were likely to be greatly injured by the said publication.

The bill then charged, that the defendants had printed and published in their work, not less than six entire poems, called "Ye Mariners of England," "Lord Ullin's Daughter," "Glenara," "Song of the Greeks," "The Turkish Lady," and "The Last Man," besides large extracts from other poems; that the same were not published as quotations for the purpose of criticism (as alleged by the defendants), and were not fair quotations for that or any other purpose allowed by law.

The defendant Scott, by his affidavit, stated, that his work was the second or companion volume to a work published by him, entitled *Book of the Poets—Chaucer to Beattie*; that the object of both volumes was to illustrate the progress of English poetry, having biographical notices of various poets, and selections from their works, illustrated by engravings; that the 2nd volume, called *Book of the Modern Poets*, contained similar biographical notices and selections from forty-three poets; that it had been the custom of the trade to publish works of a similar nature, such as *Elegant Extracts*, *Poetical Epitomes*, and many others, some of which contained poems taken from the plaintiff's works, without leave from the plaintiff, and some actually contained the very poems taken by the defen-

dants, and that no complaints had ever before been made respecting such extracts; that the editor employed to write the biographical notices, had not confined himself to the work published by Mr. Moxon, but had taken some which were not published in any of Mr. Moxon's publications, but served to illustrate the biographical notice; that it was impossible the defendants' work could injure the plaintiff, as the various editions of the plaintiff's works were sold at from 9s. to 2s. 6d., whereas the defendants' work was sold for 1l. 1s., and contained only about 400 lines taken from the plaintiff's works; that the defendants, in publishing their work, had no intention whatever of injuring the plaintiff, but they verily believed that the extracts complained of were fair and legitimate extracts, and that they were entitled to make them.

The defendants' book contained 790 pages, out of which 32 pages contained original matter, being biographical notices of the 43 poets of the 19th century, and the remaining 758 pages contained 10,000 lines of extracts from these poets, out of which only 6 whole poems, amounting to 298 lines, and 71 lines of extracts from other poems by Mr. Campbell, not published by Moxon, were contained in this book.

Mr. Cooper and Mr. Coleridge, for the plaintiff.—An injunction must be granted in this case, unless it can be shewn, that the publication is in the fair way of criticism. Here there is no criticism; there is a short essay at the beginning upon the poets, and then follow regular selections taken from the author: it is plain the principal object was to publish the poems, and then a short biographical notice is tacked on to them. The defendants say they have a right to do this. How far that right may extend to the old authors, is a different question; but they cannot possibly have any right to take from living authors, as they have done, whole poems: some line must be drawn, and surely if an entire poem is taken, that must be a piracy—*Bramwell v. Halcomb* (1).

Mr. Kenyon Parker and Mr. Glasse, for the defendants.—The injunction asked is, for the second volume only of this work; the second is a continuation of the first volume, containing the poets from Chaucer to

(1) 3 Myl. & Cr. 737.

Beattie, and this contains the modern poets, and the verses are merely taken to illustrate the general style of the poet, and form therefore a fair criticism. As to any injury arising, that is impossible, for the defendants' work will serve as an advertisement for the plaintiff's, and it cannot be a substitution for the plaintiff's work, since the quantity taken is so small a proportion, and the cost so much greater than the plaintiff's works in any of the different forms of publication—*Roworth v. Wilkes* (2). Another question is, whether the plaintiff can come for an injunction after having allowed the publication of many of his poems in other works; and whether he is not therefore precluded from having this injunction. At any rate, it shews that the custom of the trade has been always to consider such a taking as this perfectly legal—

Saunders v. Smith, 3 Myl. & Cr. 711;
s. c. 7 Law J. Rep. (N.S.) Chanc. 227.

Rundell v. Murray, Jac. 311.

Dodsley v. Kinnersley, Ambl. 403.

The VICE CHANCELLOR.—I cannot but think, that in this case the legal right is *primâ facie* quite clear with the plaintiff, because there is no question made, but that the things complained of are actually taken literally as they stand from the plaintiff's own work, which is not denied, and could not be. Now, is this work anything like an abridgment? I see passages are taken wholesale, such as they are. Some of the things are given entire, and large extracts are given from other poems; and I cannot think this can be considered as a book of criticism, when you observe the way in which it is composed. Now, I will take the book complained of, the second volume: here are 799 pages, and here are 32 pages of general disquisition upon the nature of the poetry of the nineteenth century; then, without any particular observation being appended to the particular poems, and extracts from poems, which follow, there they are, to the amount, I think, of 758 pages; and I cannot consider that that can at all be held, in anything like common sense, to be a book of criticisms. If there were critical notes appended to each separate passage, or several of the passages in succession, which might illustrate it, and shew

from whence Mr. Campbell had borrowed an idea, or what idea he had communicated to others, I could understand that to be a fair criticism. It appears to me, this is a general essay: then there follows this vast mass of pirated matter, which, in fact, constitutes the value of the volume. Then, it is said, that there is no *animus furandi*. Why you must judge a little for yourself about that. If you find that A. actually takes the property of B, *primâ facie*, the *animus furandi* is considered as proved by the taking. And it rather appears to me, here is such a very distinct taking; though I do not think it necessary to say it has been feloniously done, but it appears to me, it has been done in a manner the law will not permit. Now the case cited was one where, in a very copious work, *Encyclopædia Londinensis*, there was a treatise which had contained 118 pages, and 75 pages were taken; that, I think, is the subject of the action. It was a very small taking with respect to the large amount of the work into which it was taken, and the jury found, in that case, for the plaintiff, who complained of the improper taking. I do not think that it is necessary to sit here, and consider whether those 18 pages of poetical work, contained in the plaintiff's book, are the very cream and essence of all that Mr. Campbell has written; but it is pretty plain, that they would not have been printed at all in this work, unless the party who printed them thought they would be very attractive in themselves. It so happens, in turning over the pages, I find, that the only extract printed from the poem called "The Pleasures of Hope," is the only part of the poem of which I have any distinct recollection. I have reason to suppose, that is a very striking passage which has remained impressed upon the memory for so many years as it has upon mine. I cannot but think, *primâ facie*, the case is with the plaintiff, who has been admitted to be the original composer of these works, and who finds them now bodily collected together in the way in which they are, without any criticism at all; and, as I understand, collected merely because they are thought to be the valuable and striking parts of the poems which he has written. Then, it is said, with respect to three of them, that is, with respect to the lines on James IV.,

and the Death of Wallace, and a song, that the Court ought not to interfere, or enter into the consideration of them, in the present case. I admit, they are not mentioned in Mr. Moxon's book, nevertheless there is a general statement that the plaintiff composed them all. I observe, that Mr. Campbell is the sole plaintiff; it is not a complaint by Mr. Campbell and Mr. Moxon, or Mr. Moxon, but by Mr. Campbell solely. I consider his copyright is as much to be protected in the rest of the matters, which unquestionably have been pirated from him in this defendant's book. Then, the only question is, really, whether there has been such a *damnum* as will justify the party in applying to the Court, because *injuria* there clearly has been—what has been done, is against the right of the plaintiff. Now, in my opinion, he is the person best able to judge of that himself; and if the Court does clearly see there has been that thing done which tends to an injury, I cannot but think, the safest rule is to follow the legal right and grant the injunction. But if, however, the other side desire to bring an action at law, then the question will be tried how much of *damnum* has accompanied this *injuria*. It strikes me, upon the whole, therefore, that I ought to grant the injunction in this case; and I will put Mr. Campbell, if the other side desire it, to bring such action as he may be advised.

Mr. Kenyon Parker.—Your Honour will limit the time for bringing the action.

The VICE CHANCELLOR.—I will tell you what I shall do here, as I have done in other cases: I shall grant the injunction, giving the plaintiff liberty to bring such action as he may be advised, to establish his legal title, and reserve the further consideration of the motion, and give both sides liberty to apply; then if the action is not brought within due time, you can apply.

WIGRAM, V.C. }
Jan. 12. } SNELL v. CROCKER.

Practice.—22nd Order of August 1841—*Subpœna.*

Application under the 22nd Order of August 1841, refused, where the subpœna to appear and answer had been served in the old form.

NEW SERIES, XI.—CHANC.

A motion was made under the 22nd of the Orders of August 1841, for liberty to file a traversing note, the subpœna to appear and answer having been served in the old form.

Mr. Teed, for the motion.

WIGRAM, V.C.—The subpœna having been served in the old form, the defendant has not been properly apprised of the consequences of his default. The 22nd New Order will not, therefore, apply to this case.

Application refused.

K. BRUCE, V.C. }
March 1. } BROOKS v. PURTON.

Practice.—Order for Time—Plea.

On an application to the Master, by a defendant, for further time to answer, on grounds that had reference exclusively to an answer, an order was given for five weeks "to plead, answer, or demur, not demurring alone." This order was altered by the Court to five weeks "to answer," on the ground that the application to the Master had reference to an answer alone. The defendant put in a plea. This plea was ordered, to be taken off the file for irregularity.

A plea may be ordered to be taken off the file on motion.

This was a motion to take a plea off the file for irregularity. The time for answering of a defendant having expired, he made a special application to the Master for further time to answer, under the 20th Order of 1833. The affidavit on which the application was grounded had reference solely to an answer, and at the foot of the warrant the object of the application was specified to be time "to answer." The Master allowed the defendant five weeks for his answer; but the order, being drawn up in the usual form, gave the defendant five weeks to "answer, plead, or demur, not demurring alone." The plaintiff then moved K. Bruce, V.C. that the words, "plead or demur, not demurring alone," should be struck out of the order; and his Honour made a direction accordingly, on the ground that the defendant was, under the circumstances, entitled to no more than he had

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asked of the Master, that is, time to answer alone. The order therefore, as altered, was, that the defendant should have five weeks "to answer." The defendant afterwards put in a plea for want of a party.

Mr. Wigram and *Mr. Romilly* now moved that this plea should be taken off the file for irregularity.

Mr. Russell and *Mr. James Parker*, for the defendant.—From the time of *Peere Williams* to the present time, it has been established, that, under an order for time to answer, a defendant may put in a plea. This rule Lord Eldon, after a review of the cases, considered binding upon him; and Lord Langdale, in a recent case, has acknowledged it.

Anonymous, 2 P. Wms. 464.

Roberts v. Hartley, 1 Bro. C.C. 56.

De Minckwitz v. Udney, 16 Ves. 355.

Kay v. Marshall, 1 Keen, 190, 196.

In order to exclude a plea, the words, "but not to plead," ought to have been inserted in the order. Had the defendant known fully that he would not have been allowed to plead, he might have declined to avail himself of the order for further time, and filed the plea independently of any order. The defendant was not bound to notice what had taken place in court on the occasion that the order of the Master was altered; all that he had to look to was the formal order as drawn up. By that order he had five weeks to answer, and by the rules of the Court, under an order to answer, he might put in a plea. The plea was therefore regular. *Anonymous* (1) was also cited, to shew that a plea could not be suppressed on motion.

[*K. BRUCE*, V.C.—The case in *Mosely* on that point has been overruled by the Vice Chancellor of England, in *Moon v. Lee*, a case not reported.]

KNIGHT BRUCE, V.C.—The circumstances of the case are these :—The defendant made a special application to the Master, on affidavits, for time to answer. The affidavits stated, as grounds for the indulgence, matters which had reference and application exclusively to an answer, in the ordinary acceptance of the term. The Master intended, or ought to have intended, to give time for

an answer only. When the Master's order was brought before me, taking the same view, I directed the words, "*plea or demur, not demurring alone*," to be expunged. The defendant, knowing all this, has filed a plea, and I think has filed it improperly and vexatiously. The plea must be taken off the file; but I decide this on the special circumstances of this case. The defendant to pay the costs of the plea and of this application.

K. BRUCE, V.C. }
March 7. } *DRANT v. VAUSE.*

Will—Devise—Construction.

A. demised hereditaments for a term, and gave the lessees an option of purchase at any time within the term. A, by his will, devised these hereditaments to B. for life, with remainder to his issue in tail, with remainders over. After the death of the testator, the lessees declared their intention of purchasing the hereditaments; and, a decree having been made in their favour, the purchase-money was paid into court :—Held, that under the terms of the devise, the money ought to be substituted for the land, and settled on limitations analogous to those contained in the will relating to the land, in favour of B. and his issue.

By an indenture, dated in September 1827, George Drant demised to Richard and Thomas Sissons, certain hereditaments for a term of fourteen years, and gave the lessees an option of purchasing the demised premises at any time during the term, at the price of 2,000*l.*

George Drant made his will in March 1831, whereby, after giving his wife an annuity of 150*l.* charged upon his real property, afterwards given to his children, he gave and devised the premises comprised in the lease, with other hereditaments, to his son George Drant, the plaintiff, for life, with remainders over for the benefit of his issue in tail, with remainders over, in default of such issue, to his other children. These hereditaments were charged with a portion of the annuity given to the wife, and the option given in the lease was not noticed by the testator. The testator then disposed of his other real property to his other children, charged with

(1) *Mosely*, 207.

other parts of the annuity, and bequeathed his personal estate among his children equally. The testator died in 1831, soon after the date of his will.

In 1835, the lessees declared an intention of purchasing the hereditaments upon the terms mentioned in the lease, and instituted a suit for the purpose of obtaining a conveyance; and, a decree having been made in their favour, the purchase-money, after deducting the costs of the suit, was paid into court in that suit.

The bill in this suit was filed by the son George Drant, junior, for the purpose of ascertaining the rights of the children of the testator to this purchase-money.

Mr. T. Turner, for the plaintiff, contended, that the purchase-money, in the events that happened, had become substituted for the land, and that it ought to be settled, as money, upon limitations analogous to those given in the will as to the land.

Mr. Amphlett, for the other children of the testator, argued, that under the authority of

Lawes v. Bennett, 1 Cox, 167,

Townley v. Bedwell, 14 Ves. 590,

Knollys v. Shepherd, cited 1 Jac. & Walk. 499,

the hereditaments in question had vested in the plaintiff until the option was declared, and that after that time the title of the plaintiff became divested; the land going to the Messrs. Sissons, and the purchase-money forming a part of the personal estate of the testator. If, however, the purchase-money was to be substituted for the land, it ought to be considered as land, and settled upon limitations identical with those on which the hereditaments were settled.

Mr. Crofton and *Mr. Thorp*, for other parties.

KNIGHT BRUCE, V.C.—The testator, by the devise of this property to his son George, by his will, after the date of the lease, has, I think, clearly expressed an intention that George should have the benefit of the devise, either in the shape of money or land. I wish it to be understood, that I do not question the authorities cited, and that I consider this decision to be perfectly consistent with them. The purchase-money must be settled as money upon limitations analogous to those

contained in the will. The costs of the Sissons suit, and of this suit, must be reserved until after taking the accounts of the testator's debts and personal estate.

M.R. }
March 12. } HEIGHINGTON v. GRANT.

Executor—Administration Suit—Costs.

In a suit by residuary legatees, seeking the administration of a testator's estate, the defendant, the executor, is entitled to his general costs out of the estate, as between solicitor and client, although, in the progress of the proceedings, he may have been charged with compound interest on the balances of assets in his hands from time to time, and is on further directions directed to pay to the plaintiff the amount of such costs as had relation to that proceeding.

For the reports of this case, on further directions and on appeal, vide 9 *Law J. Rep.* (N.S.) Chanc. 142, and 10 *Law J. Rep.* (N.S.) Chanc. 12.

A bill was filed by residuary legatees, for the administration of the testator's estate; and the Master, on further directions, was directed to ascertain what balances were in the defendant's hands, at the end of each year, since the expiration of the first year after the testator's death, and he was to compute interest at 5l. per cent. per annum, on the balances in the defendant's hands at the end of each year; and the Master, in taking the accounts, was directed to make annual rests, and to charge the defendant with compound interest.

The cause now came on to be heard on the Master's report, made in pursuance of the reference to him, to charge the defendant with compound interest; and the only question for discussion (there being no other charge of irregular conduct against him) was, whether the defendant was entitled to be paid the general costs of the suit out of the estate.

Mr. Kindersley and *Mr. Keene*, for the plaintiff.

Mr. Pemberton and *Mr. Lloyd*, contended, that the general costs of the proceedings in a suit for the administration of a testator's

estate, were not affected by an unsuccessful proceeding therein, on a particular point; and cited—

Flanagan v. Nolan, 1 Moll. 84.

Travers v. Townsend, Ibid. 496.

The MASTER OF THE ROLLS decided, that the defendant must pay so much of the costs of the suit as related to the order, charging him with interest on the balances in his hands from time to time, and that the defendant was entitled to be paid his general costs of the suit, as between solicitor and client.

Re Chapman's Estate 44 L. J. Ch 720.

K. BRUCE, V.C. } MORRIS v. LIVIE.
March 14. }

Will—Breach of Trust—Legacy.

A testator bequeathed a sum of stock to A, upon trust to pay the dividends to C. P. for life, with a direction, that on the death of C. P. it should sink into the residue. He gave the residue of his estate, in trust for J. L. for life, and directed that after her decease, a legacy of 5,000l. should be paid to A, and the remainder be disposed of in the manner therein mentioned. A. assigned this legacy to B, and afterwards appropriated the trust stock. A petition presented by C. P. to be paid her annuity out of other assets of the testator, had been dismissed by the Master of the Rolls, but liberty had been reserved to her to apply after the death of J. L.:—Held, that the legacy of 5,000l., on its becoming payable, ought to be apportioned among the legatees of the testator disappointed by the breach of trust of A, to the exclusion of the assignee B.

Forgiveness of a debt in a will, followed by a direction for the payment of the legacy duty on all pecuniary legacies out of the personal estate:—Held, that the legacy duty was to be paid out of the personal estate, in respect of this forgiveness of debt.

A testator, by his will, bequeathed 4,000l. to Champion and Robert Livie, jun., on trust to invest the same in the funds, and to pay the dividends to Catherine Primrose for life, with remainder to Thomas Primrose (who died in her lifetime) for life, and directed, that after the death of the survivor,

the stock should sink into the residue of his personal estate. He gave the residue of his personal estate, in trust for Jane Livie, his wife, for her life, and directed, that after her decease certain legacies should be paid; among which, was one of 5,000l. to Robert Livie, jun., and one to Robert Primrose of 6,000l., and that the surplus should go to the persons therein mentioned. By a codicil, the testator directed, that instead of investing the 4,000l. in the funds, the trustees should purchase the sum of 6,660l. 13s. 4d., 3l. per cents., and that the dividends and capital should go in the same manner as he directed by his will as to the sum to be purchased with the 4,000l. In June 1807, the sum of 6,660l. 13s. 4d., 3l. per cents., was purchased and invested in the joint names of Champion and Robert Livie, jun.

Champion died in 1809. In October 1812, Robert Livie, jun. assigned his legacy to Seward, and in December in the same year, appropriated the stock to himself.

A suit was instituted for the administration of the estate of the testator. In this suit, a petition presented by Catharine Primrose, that her annuity should be paid out of the other assets of the testator, had been dismissed by the Master of the Rolls; but liberty had been reserved for her to apply on the death of Jane Livie. Robert Livie afterwards became bankrupt, and his assignees were made parties to the suit.

The causes coming on to be heard, after the death of Catharine Primrose and Jane Livie, a question was made as to the legacy of 5,000l., bequeathed to Robert Livie, jun. The claimants for this legacy, were the assignee Seward, the representative of Catharine Primrose, in respect of the dividends that had been withheld, and the parties interested in the residuary estate.

Mr. Wigram, Mr. Goldsmid, Mr. Russell, Mr. K. Parker, Mr. Stinton, Mr. Swanston, Mr. Alfrey, and Mr. Groves, for the different parties.

Skinner v. Sweet, 3 Madd. 244,

Hopkins v. Gowan, 1 Moll. 561,

were cited, as to the forfeiture of the legacy for the benefit of the parties interested under the will in the stock that had been appropriated.

KNIGHT BRUCE, V.C. said, that as the assignee Seward must have been aware of the power of Robert Livie to disappoint the intentions of the testator, and as he might have secured this legacy, by taking proper steps, he thought that he had no claim to the legacy. The legacy was given to Robert Livie, subject to his fulfilling the duties imposed on him by law. Having regard to the circumstances of the case, and to the order of the Master of the Rolls, he thought it most consistent with the justice of the case, and perfectly consistent with the law, that the legacy should be apportioned among those persons who had suffered by the breach of trust.

Another question arose in these causes, on the will of Jane Livie.

Robert Primrose, the legatee of 6,000*l.* under the will of the testator, had been indebted to Jane Livie in the sum of 2,000*l.*, for which he had given his bond and assigned his legacy of 6,000*l.* Jane Livie, by her will, released and discharged Robert Primrose from the payment of the 2,000*l.*, and directed that all the securities for it should be given up; and, by a codicil, directed that "all her pecuniary legacies should be paid free and clear of legacy duty," which duty was to be paid out of her personal estate.

It was contended, that as the release of a debt was a specific and not a pecuniary legacy, the legacy duty on this benefit to Robert Primrose was not chargeable on the estate of Ann Livie; but—

KNIGHT BRUCE, V.C. said, that it was the intention of the testatrix to exonerate the legatee wholly from all liability; and that, as the words "pecuniary legacy," were susceptible of carrying out that intention, he thought the legacy duty ought to be paid out of the personal estate of the testatrix.

M.R. }
Mar. 12. } HEREFORD v. RAVENHILL.

Will—Conversion—Heir-at-Law—Next-of-Kin.

H. C. by will, gave his ready monies, &c. to trustees, upon trust to lay out the same, in

one or more purchase or purchases of freehold, leasehold, or copyhold messuages, tenements, or hereditaments, and to settle the purchased premises to the same uses as were declared of certain real estates devised by his will; and H. C. by his will, constituted his wife his sole residuary legatee and executrix. Several of the limitations declared by *H. C.* of the estates mentioned in his will, failed of taking effect, by the decease of the parties interested during the lifetime of the testator:—*Held*, that the gift amounted to a conversion into real estate, but that the testator's widow, to the extent to which the gift failed of effect, (no purchase having, in fact, been made of either freehold, leasehold, or copyhold estates,) took the fund; and that the same, on her decease, became distributable amongst her next-of-kin, and did not devolve on her heir-at-law.

By indentures of lease and release, dated the 9th and 10th of June 1767, and by virtue of a common recovery, suffered in pursuance thereof, certain freehold hereditaments situate in the respective parishes of Holmer Dilwyn and Lingen, in the county of Hereford, were settled to the use of Howorth Cooke, for life, with remainder to the use of Mary Cooke his wife, for life, with remainder to the use of such person and persons, for such estate and estates, and to and for such uses, ends, intents, and purposes, and under and subject to such provisos, powers, conditions, limitations, and agreements, and charged and chargeable with and for the payment of such annuity and annuities, sum or sums of money, and in such sort, manner, and form as the said Howorth Cooke, by any deed or deeds, writing or writings, with or without power of revocation, by him duly executed, in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, or other writing purporting to be a will, by him duly executed, in the presence of and attested by three or more credible witnesses, should direct, limit, or appoint.

By virtue of the power vested in him by the last-mentioned indenture, Howorth Cooke made his will, dated the 18th of August 1767, and thereby gave and appointed the hereditaments comprised in the indenture of release, and situate in the said

several parishes of Holmer Dilwyn and Lingen, after the decease of his wife, to the use of his youngest son, Charles Cooke, and his assignees, for his life, without impeachment of waste, with a limitation to certain trustees, to preserve contingent remainders; with remainder to the use of the first and other sons in succession of the body of the said Charles Cooke, in tail; with remainder, in default of such issue, to the use of the daughters of the said Charles Cooke, as tenants in common in tail; and in default of such issue, then the limitation was to the use of his eldest son, John Cooke, and his assignees, for his life, with a limitation to the same trustees, to preserve contingent remainders, with like limitations to the issue of the said testator's eldest son, John Cooke, and in default of such issue, the testator limited the three estates to three distinct persons, (subject to the payment of certain sums of money,) who all predeceased the testator. The testator then proceeded to direct, that all his debts, funeral expenses, and the charges of proving his will, should be borne and paid by and out of his ready money, and money which should be due and owing to him at his decease, other than such part thereof as he should otherwise dispose of, in and by his will; and all the residue and overplus of his ready money, and money which should be so due and owing to him, save as aforesaid, the testator gave and bequeathed unto his friends Arnold Russell and William Ravenhill the younger, their executors, administrators, and assigns, in trust that they, the said Arnold Russell and William Ravenhill, or the survivor of them, or the executors, administrators, and assigns of such survivor, should, as soon after his decease as a convenient purchase or purchases could be found, by and with the consent and approbation of his wife, if she should be then living, signified in writing, otherwise at their own discretion, lay out and dispose of all such residue and overplus of his ready money, and money which should be so due and owing to him, save as aforesaid, either together or in parcels, in one or more purchase or purchases of freehold, leasehold, or copyhold messuages, lands, tenements, or hereditaments in the county of Hereford, and thereupon settle, convey, and assure, or cause to be conveyed and assured, all and singular the said mes-

suages, lands, tenements, and hereditaments so to be purchased, as aforesaid, to the use and behoof of his loving wife, the said Mary Cooke, for and during her life, and after her decease, then to, for, and upon such or the same and the like uses, trusts, intents, and purposes, and under and subject to such or the same and the like powers, provisoes, conditions, limitations, and agreements as were hereinbefore mentioned, expressed, declared, or directed, of and concerning the hereditaments thereinbefore mentioned to be situate in the parishes of Holmer Dilwyn and Lingen; and his will and meaning further was, and he did thereby direct, that the said Arnold Russell and William Ravenhill, and the survivor of them, his executors, administrators, and assigns, with the approbation of his said wife, whilst living, and in case of her decease, at their own discretion, should in the meantime, and until such purchase or purchases could be procured, lend and place out all such residue and overplus of his ready money, and money which should be due and owing to him (save as aforesaid), upon any public or private security at interest, or invest the same, or any part thereof, in the purchase of stock in any of the public funds, subject to the trusts aforesaid, and with such approbation as aforesaid, and so from time to time to call in such money so lent or placed out upon the securities, as aforesaid, or to sell and dispose of such stock so to be purchased, or any part thereof, as often as they should think fit, with such approbation as aforesaid, subject to the trusts thereinbefore mentioned; and his will and meaning further was, and he did thereby direct, that in the meantime, and until the said residue and surplus of his ready money and money which should be so due and owing to him (save as aforesaid), should be laid out and invested in a purchase or purchases of messuages, lands, tenements, or hereditaments, as aforesaid, and all the interest, proceeds, and produce that should arise thereby, or be made thereof, should from time to time be paid to and received by such person or persons, as and to whom the rents and profits of the premises so to be purchased as aforesaid, if purchased and settled, would for the time being belong or appertain, by virtue of that his will, and the uses and limitations thereinbefore mentioned or directed. The testator concluded

his will, by giving unto his wife the rest and residue of his goods, chattels, and personal estate whatsoever, to and for her own use and benefit, and thereby constituted her the sole executrix thereof.

The testator, Howorth Cooke, died in 1788, leaving the said Mary Cooke, his widow, the said John Cooke, his eldest son and heir-at-law, and the said Charles Cooke, his only other child, him surviving. On the death of Howorth Cooke, his widow entered into receipt of the rents and profits of the devised real estates, and William Ravenhill the younger invested the clear residue of the testator's personal estate, in his name, in the purchase of government funds, and on mortgage and other securities, the interest and dividends of which were paid to his widow during her life. John Cooke died on the 11th of January 1794, intestate and without issue, leaving his brother Charles Cooke his heir-at-law, and his mother and brother Charles Cooke his only next-of-kin. Mary Cooke died in 1802, having previously executed a will and several codicils thereto, but she did not, by any of them, make any disposition of any real estates, or of any estate of the nature of real estate, and she left Charles Cooke, her only child and heir-at-law, and sole next-of-kin, her surviving. Charles Cooke died in 1835, having previously executed a will and several codicils, but he died wholly intestate as to the property in question in this suit, and had never been married, and left Richard Hereford his heir-at-law *ex parte maternâ*, and the same person and his five sisters, his sole next-of-kin, him surviving.

The personal representatives of William Ravenhill the younger, the surviving trustee named in Howorth Cooke's will, and of Mary Cooke, were Jane Ravenhill, Samuel Carless, and Charles Holloway, and they had paid the dividends accruing on the public stocks standing in their names, to Charles Cooke, up to the time of his death, but no part of such funds had ever been laid out in the purchase of freehold, leasehold, or copyhold estates pursuant to the directions contained in Howorth Cooke's will.

The bill, which was filed by Richard Hereford, as the heir-at-law of Charles Cooke, and as one of his next-of-kin, against

the three personal representatives of William Ravenhill the younger, and Mary Cooke, and the personal representative of John Cooke, and the five sisters of the plaintiff, as the other next-of-kin of Charles Cooke, alleged that the trust fund passed under the residuary bequest contained in the will of Howorth Cooke, to Mary Cooke, his widow, and that the same partook of the nature of real estate; and that the said Mary Cooke died intestate as to the said trust fund; and that Charles Cooke also died intestate as to the said trust fund; and that the plaintiff, on the death of Charles Cooke, became entitled thereto, as the heir-at-law of Charles Cooke or of Mary Cooke, but that the defendants, the five other next-of-kin of Charles Cooke, claimed five sixth parts of the fund, as five of the next-of-kin of Charles Cooke; and the bill prayed in the alternative, a declaration, either that the plaintiff was absolutely entitled to the whole fund, as the heir-at-law of Charles Cooke, or that he and the defendants, the other next-of-kin of Charles Cooke, were entitled thereto in equal sixth parts.

The question to be discussed was, whether the trust fund was to be considered as converted into real estate, under the terms used in the will of Howorth Cooke; and whether the heir-at-law or next-of-kin of Charles Cooke were entitled to the same.

Mr. Pemberton and *Mr. Stinton*, for the plaintiff, contended, that there was an absolute trust to invest the fund in freehold, leasehold, and copyhold estates, and therefore a conversion; that if leaseholds were purchased with the fund, they must be leaseholds for lives, because the uses declared by him were inapplicable to leaseholds for years, and that the fund remained impressed with the character of real estate, and must pass to the heir-at-law.

Walker v. Denne, 2 Ves. jun. 170; see also *Van v. Barnett*, 19 Ves. 102.

Cogan v. Stephens, 1 Beav. 482, n.; s. c. 5 Law J. Rep. (N.S.) Chanc. 17.

Jarm. on Wills, vol. 1, 526.

Mr. Kindersley and *Mr. Romilly*, contra, for the next-of-kin except the plaintiff, contended, that there was no actual conversion; for the testator gave permission to the trustees to act in the alternative; and if freehold property could not be immediately found, they were to be at liberty, in the

meanwhile, to invest the fund in the public stocks; that the whole fund, if laid out by the trustees in the purchase of leasehold for a term of 999 years, would neither be a breach of trust nor improper; that in the cases where a conversion has been allowed to exist, if any of the purposes failed, the fund *pro tanto* was considered as personal estate—*Cogan v. Stephens*; and that therefore, in the present case, the fund passed to the widow of the testator under the residuary clause contained in his will, and became part of the personal estate of Charles Cooke, and became distributable amongst his next-of-kin—*Ackroyd v. Smithson* (1).

Mr. Collins, for the first three defendants, on the record, viz. Jane Ravenhill, Samuel Carless, and Charles Holloway.

THE MASTER OF THE ROLLS.—On the first point which is raised here, as to whether there was a trust for conversion, I certainly am of opinion there was. This case differs from the one which has been cited of *Walker v. Denne* in this, that the leaseholds were expressly stated there to be for a term of years; and I think, that that express term of years made the decision very right in that respect; but considering what were the objects for which the conversion was here to be made, I think that all the words ought practically to be considered with reference to that object, and so as to give effect to it; and it appears to me, that this must be considered, therefore, a trust for conversion. But that carries us certainly a very little way in the decision of this case, for there being a trust for conversion for certain purposes, which are distinctly stated in the will, and some of those purposes having failed, following the rule that the conversion is made for the purposes that can be carried into effect, and it is not made for the purposes which cannot be carried into effect, it has been necessarily admitted now, with respect to the conversion, that that portion of the limitation in the devise which could not take effect, is to remain personalty of the testator, and, being personalty of the testator, belonged to his residuary legatee under his will. Now, the residuary legatee, I apprehend, having a right to the ultimate reversion, might have directed it to be disposed

of in any manner she thought fit; she might have directed the reversion to be limited to her and her heirs; she might have directed it to be limited in any other way, it being hers, to be disposed of as she pleased. Unfortunately, nothing whatever was done, and we are left to consider what is the right to it, independently of any act whatever of the parties; and it being personal estate, because not subject to any direction by which the conversion was to be made, I do not think there is any reason from which I can fairly make the inference, that it was to go differently from that which had been the state in which it was. It was left by the testator in the character of personalty; there is no act of any sort done by which the character of personalty can be altered. It appears to me, therefore, it remains personalty, and belongs to the next-of-kin.

K. BRUCE, V.C. } LEWIS v. LEATHAM.
March 17. }

Evidence.

An abstract of a deed, not admitted as secondary evidence of the deed.

Mr. Wigram, on the part of the plaintiff in this case, having proved the delivery of a notice to a defendant, to produce a deed in his possession, proposed to read an abstract of the deed, as secondary evidence of it; but—

KNIGHT BRUCE, V.C. never knew an abstract admitted as secondary evidence, and declined to receive it.

K. BRUCE, V.C. } PETTINGALL v. PETTINGALL.
March 15, 23. }

Will—Bequest in favour of an Animal.

Bequest by a testator of 50l. per annum, to his executor, to be paid for the keep of a mare, with a direction that the executor should consider himself bound in honour to fulfil this wish, and see that she be well provided for:—Held, that the trust in favour of the mare ought to be performed, and that the executor was entitled to the surplus not required for the mare's keep.

(1) 1 Bro. C.C. 503.

A testator made the following bequest by his will:—"Having a favourite black mare, I hereby bequeath, that at my death, 50*l.* per annum be paid for her keep in some park in England or Wales; her shoes to be taken off, and she never to be ridden or put in harness; and that my executor consider himself in honour bound to fulfil my wish, and see that she be well provided for, and removeable at his will. At her death all payment to cease."

It being admitted that a bequest in favour of an animal was valid, two questions were made: first, as to the form of the decree on this point; and secondly, as to the disposition of the surplus not required for the mare.

KNIGHT BRUCE, V.C. said, that so much of the 50*l.* as would be required to keep the mare comfortably, should be applied by the executor, and that he was entitled to the surplus. He must give full information, whenever required, respecting the mare; and if the mare were not properly attended to, any of the parties interested in the residue might apply to the Court. The decree on this point ought to be, that 50*l.* a year should be paid to the executor during the life of the mare, or until further order; he undertaking to maintain her comfortably; with liberty for all parties to apply.

Mr. Wigram and Mr. Romilly, for the executor.

Mr. Swanston, Mr. Keene, Mr. Simpkinson, Mr. Shadwell, Mr. Russell, Mr. Havens, Mr. Parker, and Mr. Heathfield, for other parties.

V.C. }
Mar. 14. } DAUBENY v. COGHLAN.

Will—Mistake in Description—Practice, upon Exceptions being allowed.

A testator gave a sum of stock to trustees, for the benefit of "all and every the child and children of his niece Catherine, and of his nephew, the late James Coghlan." The testator never had any nephew named James, who was ever married and had children: the only nephew who was ever married, and who was dead at the date of the will, having left children surviving him, was named Henry. Evidence was entered into before the Master,

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who found that the testator had mistaken James for Henry:—Held, upon exceptions to the Master's report, that the testator, having made his will in ignorance of the real state of his family, had made no more mistake than that of giving to the children of a person who had no children. Exceptions allowed.

The Master having made his report upon certain evidence produced, and the Court having decided that the Master is wrong, those who rely on the report are considered by the Court as entitled to a reference, in order that they may have further evidence brought forward, than that which has satisfied the Master.

This cause came on upon exceptions to the Master's report, to whom it was referred, to inquire and state what persons were meant by Andrew Coghlan, the testator, by "all and every the child and children of his niece Catherine Anthony and his nephew Charles Coghlan." The state of facts carried in before the Master was to this effect:—that the testator, Andrew Coghlan, by his will, dated the 14th of March 1837, gave and bequeathed to his trustees the sum of 5,000*l.* 3*l.* per cents., upon trust to pay and apply, or assign and transfer the same to and amongst all and every the child and children of his niece Catherine Anthony, and of his nephew, the late James Coghlan, to be divided between and amongst them, if more than one, share and share alike; and if there should be but one child, then to such only child; to be paid to the sons at twenty-one, and the daughters at twenty-one or marriage: that the testator died in March 1837, without issue: that the testator never had any nephew named James Coghlan, who was ever married, and had any children or child: that the testator had five brothers, and no more, named John, Edmund, Charles, James, and Thomas Coghlan, and also four sisters; his eldest brother, John, died about thirty years ago, in the lifetime of the testator, without leaving any child or children; his second brother, Edward, died in 1827, leaving one child only, who died several years before the will of the testator, without having been married; that his third brother, Charles, died in 1829, leaving one son and one daughter, named James and Cecilia; James married, and died in 1821, without children: that the fourth

2 A

brother, James, died in 1795 or 1796, leaving two sons, James and Henry, and two daughters; James died after his father's death, in the lifetime of the testator, before the date of his will, an infant unmarried, and Henry died in 1827, in the lifetime of the testator, and before the date of his will: that Henry was the only nephew of the testator who was ever married, and who was dead at the time of the date of the testator's will, having left any children him surviving: that the testator saw his nephew Henry in 1809 or 1810, and he had frequently told his wife Sarah Coghlan, that he intended to leave a portion of his property to Henry: that the testator was aware, at the time he made his will, that his said nephew Henry had died, leaving children, and was also aware that his nephew James had died without leaving any children: that the testator, before he executed his will, read it over to his wife, and asked her if she approved of it, as it was not too late to alter it: that she, upon hearing the will, fully believed that the testator had named his nephew Henry's children as legatees; and she was satisfied in her own mind, that the name of James was inserted by mistake instead of Henry; that such mistake might have arisen from some confusion of names, owing to James being the name of Henry's father, who died forty years ago: that soon after the death of the testator's nephew Henry, the testator was written to by Captain Edmunds, and informed of that fact: that neither the testator nor his wife discovered that the name of James was inserted in the will: that the testator had been very much displeased with the conduct of his nephew James: that the testator had frequently expressed himself in terms of great approbation towards his nephew Henry, to his intimate friend Capt. Edmunds, who believed the testator intended to secure his property to him: that the testator's fifth brother, Thomas, died an infant, before the testator was born.

Evidence was produced in support of this state of facts, which was carried in before the Master, by the defendants, the children of Henry, who therefore charged, that the persons meant by the testator, by "all and every the child and children of his nephew, the late James Coghlan," were the said infant children of his nephew Henry Coghlan; and that no other nephew of the testator

ever had children; and that the name of James was inserted in the testator's will by mistake for the name of Henry. Under the circumstances stated, the Master certified, by his report, that the testator clearly made a mistake, when he coupled with his gift to the children of his niece Catherine Anthony, a gift also to the children of his late nephew James Coghlan; and secondly, that it appeared by the pedigree and evidence, that the testator had no nephew of the name of Coghlan that had left children, except his nephew Henry, and that the testator was in various ways made acquainted with the fact that his last-named nephew Henry had left children; and therefore if it was to be presumed (as the said Master thought it must be), that the testator meant to benefit some other of his great-nephews and nieces besides the children of his niece Catherine Anthony, he could (as the fact stood) only effect that intention by coupling with her name the children of his late nephew Henry. And the Master reported, thirdly, that he found the children of the testator's nephew Henry, were the persons meant by the testator, in so much of his bequest as purported to refer to the child or children of his late nephew James Coghlan.

To this report exceptions were taken by the children of Catherine Anthony, on the ground that there was not sufficient evidence for the Master to have come to these conclusions.

Sir Charles Wetherell and *Mr. Lovat*, in support of the exceptions.—The only cases in which evidence can be admitted to prove a mistake, and let another person into the will by substitution, is, when a person is known by two names: here there is no such evidence; there is no evidence of the testator knowing that his nephew Henry had children, or that the children of Charles had ever died. This is the common case of persons well described, but there being no one capable of taking, no case has been shewn to let in evidence; but even if evidence should be received, this evidence does not in any way establish the fact of the testator having made a mistake in the name.

Cases cited:—

Del Mare v. Rebello, 3 Bro. C.C. 446.

Holmes v. Custance, 12 Ves. 279.

Miller v. Travers, 8 Bing. 244; s. c. 1 Law J. Rep. (N.S.) Chanc. 157.

Mr. Bethell and *Mr. Chandless*, contra. —There is in this case a description applicable partly to one person and partly to another. If a testator is shewn to have made a will in favour of an impossible object, that contains in itself evidence of some mistake. If the seeds of a mistake are found, the least evidence should be sufficient to induce the Court to take the person who answers nine-tenths of the clause, particularly when no one else is found to answer it in the least. The substantiality of the gift is a bequest to a nephew, named Coghlan; and having arrived at that, it is found that Henry was the only nephew having children. The testator clearly had in his mind the children of a nephew called Coghlan. There is no one to claim in competition; but this is an objection by the children of Catherine, to any one being intended—*Jones v. Morgan* (1).

The VICE CHANCELLOR.—This appears to me really to be a reasonably plain case. We should first of all look at the very words of the will, and see whether it is not evident, on the face of the will, that this testator chose to make it, to a certain extent, in the dark. Now observe this—he gives a sum of 3½. per cents. to the trustees, “on trust, to pay or apply, or assign and transfer the same, to and amongst all and every the child and children of his niece Catherine Anthony, and his nephew, the late James Coghlan, to be divided between and amongst them, if more than one, share and share alike; and if there should be but one such child, to such only child.” And then there is a proviso as to the time of payment to such child or children: to the sons at twenty-one, and the daughters at twenty-one or marriage, which words shew to me,—at least, it reasonably leads to the inference—that at the time when the testator made his will, he was ignorant whether the subjects which are made the objects of his bounty were really in existence or not. It is evidence of an intention to decide in defiance of knowledge. Now, there are two circumstances to be considered; one, that the father of the children who claimed was named Henry, and the other, that James, who was the son of Charles, died without issue.

Why might not the testator as much have forgotten the one fact as the other? How am I to know that he forgot one more than the other? If he forgot both, why then it was as reasonable for him *prima facie* to devise in favour of the unknown children of Charles, as in favour of the unknown children of Henry. There is nothing whatever on the face of the will which at all makes me incline to think that the testator forgot one of the facts more than the other, and the presumption rather would be, that he would be more aware of the fact of the father of the children, who claims, being named Henry, than he would have impressed upon his mind, at the time that he made his will, the fact that the son of Charles, who had died twenty-six years before, had died without children. Then, with respect to the evidence which has been given here, it is of the loosest and most unsatisfactory nature. I do not at all wish to impeach the veracity of Mrs. Coghlan; on the contrary, it appears to me, the very diffuse way in which she has spoken shews, that she meant, as it were, to empty all her mind on the subject into an affidavit; but she has stated things which appear to me to be very extraordinary, for she tells you, that the testator read over the will to her, and asked her the particular question, whether she approved of it; and said, if she did not, it was not too late,—meaning that it might be altered. She does not state what answer she gave, but it is quite plain that she did approve of it. Now, if by the statement she makes, namely, that the testator read the will over to her, she wishes to have us understand that she was aware of every portion of the will, or, at any rate, of this particular portion; why, then it is a most extraordinary thing, that with such knowledge as she seems to have had in her own mind that Henry was meant, that she should never have suggested it; and, I must say, inasmuch as it appears to me more likely that the testator knew at the time when he made his will that Henry was the name of the father of the children who claimed, than that he knew of the fact, in the sense of having it present to his mind, that James had died without children, that is, the James who died twenty-six years before the will was made, my opinion is, there is nothing for me to look to but the words in the will.

(1) *Fearne*, App. 577, and 3 Bro. P.C. 323.

He makes the gift in utter ignorance of the facts; and, upon the whole, it appears to me there is nothing whatever which can enable me to say, there is any more mistake than there is a mistake made when a person gives to the children of A, and it turns out that A. has no children.

Mr. Bethell then said, it would of course go back to the Master, that he might receive further evidence.

Sir Charles Wetherell objected to this course, as all the facts of the case were out; the only point was, that the Master had treated it as a topic of mistake, instead of a topic of fact.

The VICE CHANCELLOR.—I cannot tell what other evidence there may be, but certainly it has been the habit of the Court, where a report has been made in a given manner upon certain evidence, that the parties who rely upon the report should be considered, by the Court, as capable of having more evidence brought forward than that which has satisfied the Master. They abstained from bringing forward more evidence, because they found the Master was satisfied with that which they had produced; and unless, therefore, it could be made out to me, that there could not be any further evidence, I rather think I should most comply with the rule of the court in sending it back to the Master. It must go by analogy: in a case where it is referred to the Master to see whether there is a good title, a discussion arises on some particular fact, and the parties in support of the title bring forward some evidence which satisfies the Master—the Master reports that it is a good title—it comes back to the Court—the Court is of opinion, that the Master ought not to have reported as he did; or, in other words, that the evidence was not sufficient. Now, what injustice it would be to prevent those who might, but for the intimation of the Master's opinion in their favour, have brought further evidence, from having an opportunity of bringing forward such evidence. I shall allow the exceptions, with reference to the case upon which the Master has reported, and send it back to the Master to review his report.

L.C.
Nov. 4, 5, 1841. } *Ex parte* BURNETT AND
April 23, 1842. } BOYD *in re* BLAKE.

Bankrupt—Separate Fiat — Petitioning Creditor's Debt—Joint and Separate Debts —Proof of Joint Debt.

A separate fiat is issued against A, on the petition of two persons who are joint creditors of A. and B, and separate creditors of A:—Held, (reversing the decision of the Court of Review,) that they are entitled to prove against the estate of A, in respect of both the joint and separate debts.

This was an appeal by way of special case, from the Court of Review, which had decided, that where a separate fiat had been issued against a bankrupt by two persons who were the separate creditors of the bankrupt, and also the joint creditors of the bankrupt and another person, those parties were not entitled to prove for the amount of the joint debt against the separate estate of the bankrupt.

Mr. Swanston, Mr. Girdlestone, and Mr. Teed, in support of the appeal.—It has been settled, and cannot be questioned at the present day, that a joint creditor may sustain a separate fiat and receive dividends with the separate creditors (1). In this case, the fiat is as much sustained by the joint as the separate debt; and if such be the case, it is difficult to understand how the petitioning creditors can be precluded from proving both their debts, for, by their proof, they deprive themselves of the right to proceed at law for the recovery of either of their debts, and the privilege of proof ought to be co-extensive with the advantage arising to the separate creditors in respect of the fiat, which is supported by the aggregate debts of the petitioning creditors, consisting of their joint and separate debts; a fiat being in the nature of an execution for the benefit of all the creditors. There is nothing in the 62nd section of the stat. 6 Geo. 4. c. 16, to restrict the right of the petitioning creditors. The fiat issues on the making of a general affidavit of debt, and not of a particular joint or separate debt; and the existence of part of the debt, and not the ingredients of it, are necessary to be proved to support the fiat:

(1) *Ex parte* Crisp, 1 Atk. 133.

it is a matter of justice, and not of necessity, that the petitioning creditor, who is joint creditor, is allowed to come in and prove with the separate creditors.

The other cases cited in support of the appeal were :—

Ex parte Hall, 9 Ves. 349.

Ex parte Ackerman, 14 Ibid. 604.

Ex parte De Tastet, 17 Ibid. 247.

Ex parte Bolton, 2 Rose, 389; s. c. Buck. 7.

Ex parte Crinson, 1 Bro. C.C. 270.

Ex parte Elton, 3 Ves. 239, as to the observations of the Lord Chancellor.

Ex parte Wilson, 1 Atk. 152.

Ex parte Ward, Ibid. 153.

Ex parte Lewes, Ibid. 154.

Ex parte Hardenbergh, 1 Rose, 204.

Ex parte Bryant, 1 Ves. & Bea. 215.

Mr. Bethell and *Mr. J. Russell*, contra. —The exception as to proof made in favour of a joint creditor suing out a separate fiat, arises from two causes; first, the circumstance of his making his election to proceed in respect of his debt only under the fiat, (*Ex parte Elton*); and, second, to prevent the probable removal of the very foundation-stone of the fiat. In the present case, the separate debt is sufficient in amount to support the fiat; and therefore the suing out of the present fiat is no election to proceed in bankruptcy, as regards the joint debt of the petitioning creditors, for a joint and separate creditor suing out a separate fiat, as in the present case, is not inconvenienced by the rule of law which restrains a mere joint creditor from proceeding at law, and he loses no remedy in respect of his joint debt against the co-debtor—*Heath v. Hall* (2). The statute only speaks of a joint creditor being a petitioning creditor, and the existing anomaly of allowing a separate fiat to be supported by a joint debt, is accounted for by Lord Loughborough, in the circumstance of the separate creditors gaining a benefit thereby; whereas in the case before the Court, there is no occasion to take advantage of the petitioning creditors' joint debt, inasmuch as there is a separate debt due to the petitioning creditors, which will sustain the fiat—*Ex parte Barned* (3).

(2) 4 Taunt. 326.

(3) 1 Glyn & Jam. 309.

The LORD CHANCELLOR.—The petitioners, in this case, are creditors of Edward Blake and William Blake, to a very large amount, and they were also creditors of Edward Blake alone to the amount of between 200*l.* and 300*l.*; they sued out a separate fiat against Edward Blake; and the question is, whether, under that separate fiat against Edward Blake, they are entitled to prove their joint debt, and to receive dividends, in competition with the separate creditors. Now, the rule in general is, that where a joint creditor sues out a separate fiat, he is entitled, in respect of his joint debt, to prove against the separate estate, in competition with the separate creditors: he is, indeed, upon an equal footing with the separate creditors; that is the general rule. But it is stated in this case, that there is an exception, and that is, that the separate debt is sufficient to support the fiat; and, therefore, the petitioners have no right to prove and receive dividends upon the separate estate in competition with the separate creditors. I do not find in any text writers, nor do I find in any reported case, any hint of any such exception; and as this state of circumstances must have frequently occurred, it appears to me, that that affords strong evidence of the opinion of the profession with respect to this matter, because, as the rule is general, it is impossible almost to suppose that any party would have abandoned his right to prove, without obtaining the judgment of a Court on the subject. The silence, therefore, of all reports of text-writers upon the subject, leads me to the conclusion, that the opinion of the profession has been adverse to any such supposed exception. But the case does not rest here: the fiat is supported by the whole debt; it is supported by the separate debt, and by the joint debt; the one supports the fiat just as much as the other; if a part of the separate debt fails, so as not to be sufficient in amount to maintain the fiat, then the fiat is supported by the joint debt. If a part of the joint debt fails so as not to be sufficient to support the fiat, the fiat is then supported by the separate debt. The creditors have a right to rest upon both debts, for the purpose of supporting the fiat.

It does not appear to me, therefore, that in principle there is any ground to support this exception. But further, the petitioning

creditor having a joint debt, is not upon an equal footing with other joint creditors, unless he is allowed to prove under the separate fiat. Other joint creditors, in respect of a joint debt, may sue the bankrupt, and sue his co-debtor at law, but the petitioning creditor cannot do this, for he is considered as having conclusively made his election not to proceed at law; and the utmost that was contended for at the bar was this, viz. that in the event of any deficiency, he would have a right to prove against his co-debtor, but the co-debtor may have no funds—he may be unable to pay—he may be entirely insolvent; and, therefore, unless the petitioning creditor, who is precluded from proceeding against the bankrupt at law, has a right to proceed against the separate estate, he is not on an equal footing with the other joint creditors. Again, previous to the statute 49 Geo. 3. c. 121, how did the matter stand with respect to petitioning creditors and other creditors? An ordinary creditor, if he made a distinct demand, might prove under the commission for one demand, and proceed at law for another, as in *Botterill's case* (4), and the other cases of that description; but the petitioning creditor has no right to do this if he had two distinct demands; for, having conclusively made his election, he had no right to proceed at law on either of them. Even supposing one were insufficient to support the commission, still he was bound to proceed under the commission, with respect to the other; in short, he was considered as having conclusively made his election, and had no right whatever to proceed at law; therefore the circumstance of the separate debt being sufficient to support the commission, appears to me to have no decisive bearing on the subject. For these reasons, I am of opinion, that the general rule must prevail, that this supposed exception is not warranted by any principle, and certainly not warranted by any decided case; and therefore the judgment of the Court of Review must be reversed.

Note.—It has been thought desirable to print this case with as little delay as possible.

(4) 1 Atk. 109.

WIGRAM, V.C. }
Dec. 20, 21, 22, 1841. } WILLETT v. BLAN-
Jan. 12, 1842. } FORD.

Partnership—Deceased Partner—Account.

By articles of partnership, A. and B. agreed to become partners for twenty-one years, and to take the profits in the proportion of seven-tenths to A, and three tenths to B; in case of A's death during the term, B. was to carry on the business for the residue of the term, with A's executors, who should be entitled to one-third of the profits, and B. to two-thirds; B. paying to the executors so much money as A's share of the capital exceeded one-third, to be ascertained by appraisement. On the death of A. during the term, B. (who was his executor) carried on the trade with the whole of the testator's capital, and without following out the provisions of the articles; accounting, however, to A's estate for one-third of the profits, and paying 5l. per cent. upon the excess of A's capital:—Held, that B. was liable to account for the profits of the business since A's death.

In such a case, there is no universal rule as to the proportion of profits to which the estate of the deceased partner is entitled; and the Court will not decide upon such proportion, without a previous inquiry as to the nature of the trade, the amount of capital employed, the state of the accounts at the death of the testator, and the conduct of the business afterwards.

On the 30th of December 1815, Gerard Willett (the testator) entered into partnership with Vince, since deceased, and the defendant Blanford, in the business of picture-frame makers, and articles of partnership of that date were executed between them; by the terms of which, the partnership was to last for twenty-one years, from the 1st of January 1816; the capital employed in the business was to be taken at 2,000l.; Vince and Blanford were to pay to Willett 400l. each, and the profits were to be divided in the following proportions: to G. Willett three-fifths; Vince one-fifth; and Blanford one-fifth: the trade to be carried on in the same premises; none of the parties, except Willett, to part with his interest. It was then provided, that in case

G. Willett died during the term, Vince and Blanford, or the survivor of them, should, during the residue of the term, carry on the trade in the premises, conjointly with the executors or administrators of G. Willett, or such person as he should name in his will; and that, thereupon, the executors, &c. of Willett should be entitled to receive one-third part of the profits of the business, and Vince and Blanford, or the survivor of them, should be entitled to the other two-thirds; the losses and expenses to be borne by the executors, &c. of Willett in the same proportion; and that Vince and Blanford, and the executors, &c. of Willett, should thereupon enter into articles of partnership for the residue of the term, under similar covenants with the present indenture. And further, that in case of Willett dying during the term, Vince and Blanford, or the survivor of them, should pay to his executors so much money as Willett's interest in the capital and stock exceeded one-third, (to be ascertained by a fair appraisement,) within three years, by six half-yearly instalments; the first instalment to be made within three weeks after Willett's death, and the remainder to be secured by the bond of Vince and Blanford, or the survivor of them. The business was commenced by the three upon that footing, and in 1819 Vince died, without having brought in the 400*l.*; and accordingly Willett and Blanford became entitled to the profits in the following proportions; Willett to seven-tenths and Blanford to three-tenths. At the time of the partnership, B. Willett, the nephew, was in business as a carver and gilder. On his death in 1821, Willett and Blanford entered into a distinct partnership with his widow, in the business of carvers and gilders; and by a parol agreement they were to share the profits in thirds. The widow died in 1827, and Willett and Blanford continued that business, as entitled to the profits in moieties, keeping distinct accounts and a separate place of trade. In June 1826, Willett and Blanford purchased out of the partnership assets a leasehold house in Bouverie Street, with the adjoining premises, and they then removed the said two trades to that place. Gerard Willett died in August 1829, and by his will gave all his interest in trade, and all his estate to his wife (a defendant), S. Coley, since deceased, and Blanford, upon

trust, to pay his wife, during her widowhood, an annuity of 200*l.* a year, and upon further trust, to maintain his five children till they attained twenty-one; and after giving certain other annuities, he directed the residue of his estate to be divided among his children when the youngest attained twenty-one, with benefit of survivorship. And the testator appointed the trustees executors of his will. The three executors proved the will, and S. Coley died without having possessed herself of any of the partnership assets. The bill alleged, that the capital of the two trades was of considerable value at the time of the testator's death; that Blanford and Mrs. Willett did not avail themselves of the provisions of the partnership deed; but Blanford took the sole management of the two businesses, and carried them on under the style of Willett & Blanford, with the whole of the testator's share of the capital, till the 31st of August 1838, without any appraisement or new articles, and without coming to any account with the testator's estate, or giving a bond according to the provisions of the partnership deed. It was alleged, that Blanford during that time had expended large sums of the partnership property in repairing the business premises; that he had lent 2,000*l.*, part thereof, to his brother-in-law upon a promissory note, of which sum, 1,500*l.* was now due, and that the said sum was not lent for partnership purposes. The bill was filed by the residuary legatees under the will of G. Willett, against Mrs. Willett and Blanford; and it prayed an account of the personal estate of the testator, received by the executors; of the stock belonging to the testator in the two trades at the time of his death, and the debts due to the concerns; and a declaration that the testator's estate was entitled to seven-tenths of the profits of the picture-frame business, and a moiety of the profits of the carving business, which had accrued in each year since the death of the testator, and that the partnership affairs might be wound up, and the premises and stock in trade sold; and a declaration, that in taking the account, Blanford might be charged personally with the 2,000*l.* lent; and an inquiry as to the money expended by Blanford, in repairs of the premises since the death of the testator, and for an inquiry as to what money had been paid to G. Wil-

lett the son, in respect of his share of the residue.

The answer of the defendant Blanford insisted, that in June 1829, (before the testator's decease,) J. A. at the request of the testator, examined and settled the accounts of the two trades, which accounts were approved by the testator, and would have been signed by him, but for his sudden illness and death; that shortly after his death, the accounts were settled and brought down by the said J. A. to the day of the testator's death; and that the value of the partnership assets was ascertained, and such accounts were then signed by Blanford, Mrs. Willett, and S. Coley, who took an active part in the trusts of the will, though she had possessed herself of none of the testator's estate; that by the accounts, it appeared that the testator's share in the picture-frame business, at the time of his death, was 4,437*l.*, and Blanford's share 3,711*l.* 18*s.* 4*d.*; that the capital then employed in the carving business, did not exceed 143*l.* 7*s.* 4*d.* The defendant admitted, that after the testator's death, he took the whole management of the two trades, and insisted, that from that time he was entitled to two-thirds of the picture-frame business, and to the whole profits of the carving business; that Blanford did nevertheless allow the testator's estate the one-third of the profits of the carving business, and that he debited himself in the books with the amount of the excess of the testator's capital, and with 5*l.* per cent. per annum thereupon; he admitted the money laid out in the improvements in the premises in Bouverie Street, and that he charged himself with two-thirds of such expenditure, and the testator's estate with one-third; that in August 1838, the partnership term having expired, he, Blanford, and Mrs. Willett agreed to dissolve partnership, and that then the accounts of the executors and of the partnership were drawn out to August 1838, and examined by Mrs. Willett and her solicitor; that the stock, &c. of the two trades were duly and correctly valued by G. Willett the son, on behalf of Mrs. Willett, and by R. P. on the part of the defendant, and the accounts were settled and signed by him and Mrs. Willett in September 1838, and notice of the dissolution was inserted in the *London Gazette*; and that by deed of November 1838, reciting that the

stock, &c., and the leasehold premises had been fairly valued, and that 4,479*l.* 5*s.* 7*d.* was due to the estate of the testator, Mrs. Willett assigned the two trades, the stock, &c., and the leasehold premises, to Blanford, who, in consideration thereof, covenanted to invest the 4,479*l.* 5*s.* 7*d.* in the public funds, upon the trusts of the will, and to pay interest at 5*l.* per cent. till the same was invested; that in November 1838, Blanford, at the request of Mrs. Willett, advanced 647*l.* to G. Willett the son; that since August 1838, he, Blanford, had carried on the two trades on his own account, and insisted that the picture-frame business had been carried on in pursuance of the articles, and that he was entitled to two-thirds of the profits of that business; and he admitted that no new articles of partnership were executed; that no bond was given for, or payment made on account of the testator's interest in the stock, in pursuance of the articles, but that he had paid interest on such excess, at the rate of 5*l.* per cent., and that the money due to the testator was forthcoming. He admitted also, that 1,500*l.* was due to the partnership assets, on account of the 2,000*l.* lent, and that the same sum was included in the partnership accounts.

Mr. Sutton Sharpe and Mr. O. Bichner, for the plaintiffs.—The surviving partner, Blanford, was at liberty to continue the picture-frame business, in partnership with his co-executors, but upon the terms of paying over the excess of the testator's share above one-third, of executing partnership articles, and giving a bond to secure the instalments. The carving and gilding business would have been his absolutely, upon his selling the stock and paying the testator's share in the capital; but as he did not choose to comply with the provisions of the deed in the one case, or to sell the partnership property in the other, and all the capital of the testator remained in the business, Blanford must be considered as carrying on both trades on the same footing as if the testator were alive; and must consequently account for seven-tenths of the profits of one business, and a moiety of the other.

Wedderburne v. Wedderburne, 2 Keen, 722; s. c. 4 Myl. & Cr. 41; 8 Law J. Rep. (N.S.) Chanc. 177.

Cook v. Collingridge, Jac. 607.

Crawshay v. Collins, 15 Ves. 218; s. c.

1 Jac. & Walk. 274; 2 Russ. 325.

Blanford and Mrs. Willett could make no such arrangement as that set up by the answer, which would enable Blanford to trade with the capital of the testator, and expose it to risk, himself claiming the benefit of such trading. Blanford insists by his answer, that he has paid interest on the share of the testator, and that the principal is forthcoming. That is no answer. His *cestuis que trust* are entitled to claim the profits—*Docker v. Simes* (1). To obtain the benefit of the deed, Blanford ought to have fulfilled the conditions of the deed strictly.

Cocker v. Quayle, 1 Russ. & Myl. 535.

Hopkins v. Myall, 2 Ibid. 86.

The conditions not having been complied with, the general law of partnership will apply, and Blanford not having realized the assets of the partnership by a sale, the testator's estate is entitled to the same proportion of profits as the testator himself would have been; if he was still alive, and this on the principle that the partnership has never been put an end to.

Mr. Evans, for Gerrard Willett, the son.

Mr. Greene, for Mrs. Willett.

Mr. Temple and Mr. Bacon, for Blanford.

Mr. S. Sharpe, in reply.

WIGRAM, V.C.—I give Mr. Blanford credit for the best motives, and the belief that he was doing what was most beneficial for the testator's estate; but I have no discretion but to apply the general and well settled rule of law, that if a person who takes upon himself a fiduciary character embarks the trust property in his own trade, he is bound to account for the profits, even if that trade was carried on for his own benefit. That proposition is plain, and has been acted upon ever since the case of *Crawshay v. Collins*; and the only question raised has been, in what manner and proportion the profits are to be accounted for. Are there any circumstances to take this case out of the general rule, which is, that a sale shall take place at the death of a partner? In this case, a particular power was given to the continuing partner to keep part of the testator's property in the trade. If he chose to do that, an ap-

(1) 2 Myl. & K. 655; s. c. 3 Law J. Rep. (N.S.) Chanc. 200.

praisement was to be made, &c. The testator afterwards made his will, and appointed Blanford and Mrs. Willett executor and executrix. It was said in argument, that it was the testator's own act in making Blanford his executor. But the obvious answer to that is, that Blanford was not bound to prove the will; but if he did, he placed himself in a positive incapacity to contract for or deal with the property for his own benefit. Even, then, he might have come to the Court in an amicable suit, and at a trifling expense have got the whole matter set right. But it was argued, that he must then have paid the excess of the stock into court, and the children would then have got little more than 3*l.* per cent.; whereas they were receiving 5*l.* per cent. from Blanford. The rule of this court proceeds upon the supposition that it is more advantageous to the children to have 3*l.* per cent. safe, than 5*l.* per cent. with the risk of trade. It is said, that no loss has happened; but a case of this kind is not to be determined by the result, for the children, by the speculation, might have lost the whole of their principal. The rule must be abided by, which is, that a party must account if he continues the property in trade. Nothing can save Blanford from the liability to account, if he did not deal with the property so as to bring himself within the protection of the articles of partnership. Three changes were to take place; a fair appraisement was to be made, a bond given, and fresh articles executed. The appraisement was made by Blanford himself, who, by the rules of the court, was bound to give to the estate the benefit of his own diligence; he himself settles, in 1829, what is the amount of the testator's property. The appraisement may have been fair; but, dealing upon general principles, is an account settled by an executor on his own behalf, one which can stand in this court? Then must I not treat the case as if nothing had taken place but Blanford's carrying on the business with the capital of the testator? The settlement of 1838 must fail, because it was founded upon an account, which account proceeded upon the basis of that of 1829. As to that part of the case, I have not during the argument entertained a doubt; and I have no discretion as to the decree I must make. The next question is one of great difficulty, i. e. whether the testator's estate is entitled

to the same proportions of the profits in the two trades as the testator was in his lifetime—*Crawshay v. Collins*. That case came before Lord Eldon in a subsequent stage—2 Russ. 325. That case was considered as deciding that the assignees were entitled to a share of the profits in proportion to the capital employed. The decree decided no such point; but that was the principle which the subject of inquiry was considered to establish, because the inquiry was to ascertain the amount of capital employed, *ultra* the amount in the concern at the time of the bankruptcy; it being understood that if more capital was employed, the assignees were then entitled to a share of the profits in addition to the share at the time of the bankruptcy. It is extremely difficult to see what the inquiry was, for if that was not the point—if the abstract proposition is right, that the partnership is considered as carried on in the same proportions as at the date of the bankruptcy, what occasion was there for the inquiry? The very fact, that Lord Eldon thought that inquiry necessary, was a declaration of his opinion, that the amount of the capital might be a material consideration. If the principle is once carried out, that the amount of capital employed would make a difference in the amount of profits, the subtraction of the capital by a partner might also make a difference. That that was the understanding and unavoidable effect of the decision, is proved by the judgment of Sir W. Grant, in *Featherstonhaugh v. Fenwick*, where, after stating the right of a retiring partner to have sale of the partnership effects, he states the right of the party where that has not been done: "that the parties continuing to trade with his stock, under the liability to answer for the profits, the same inquiry must be directed as in *Crawshay v. Collins*, to ascertain what was the stock at the period of the dissolution, what use was afterwards made of it, and what profits were produced by the trade."

Now Lord Eldon, in his original judgment in *Crawshay v. Collins*, decides nothing; he will know the facts first. In *Brown v. De Tastet* (2), the question was argued, whether the estate of a deceased person was to have a share of the profits of the trade, proportionate to the amount he would have

had in his lifetime, or in what other proportion. Lord Eldon said, "It is asked, will you say, that in all cases where there is a partnership, such is to be the consequence of carrying on a business, that the profits shall be divided in the same way as if the partner had not died or had not become bankrupt? I say no; I do not mean to say that it will be so in all cases; but, on the other hand, I will not deny that it may be the law in some cases."—"Those who choose to employ the property of another for the purposes of their trade, exposing it to all the risks of insolvency or bankruptcy, have no right to say that the account shall not be taken, if it can be taken without incurring difficulties which might embarrass the house to such an extent as to make it unjust to demand it." The general rule is, that an account shall be taken of the profits, without at that time saying, what is the rule to be applied as to the proportions. The case coming on again before Lord Eldon, (2 Russ. 346,) he says, "This, therefore, is a case in which the surviving partner has made profits by the use of the funds which belonged to the partnership itself: then another question arises—if he has added funds of his own to those funds, is that circumstance to vary the rule?"—"On the other hand, is not this the more equitable rule, that you shall consider what you have added to the partnership funds, as a debt due to you from it, which shall diminish the profits, or that it shall be made the subject of a claim for just allowances?" I cannot comprehend, if the addition of capital will vary the rule, how the diminution will not vary the rule too, if you once admit the principle that a change of capital makes a difference. Again he says, "My opinion goes upon the particular circumstances of this case, and I do not lay down any principle which will decide any other case." Having made these general observations, that the increase of capital is in particular cases to be the rule, his decree is worded thus, "That having regard to all the circumstances of the case," &c. Coupling this with *Brown v. De Tastet*, can it be said, that there is any general rule? Till the case of *Cook v. Collingridge*, there was no case in which the Court decided, without knowing what the account was. In *Crawshay v. Collins*, the original share of the

capital of the testator was remaining, so that there was no principle of division except the three-eighths. Then comes the case of *Wedderburn v. Wedderburn*. If the case of *Crawshay v. Collins* laid down a general rule, Lord Langdale has distinctly overruled it in *Wedderburn v. Wedderburn*, which was confirmed on appeal. I have very anxiously considered whether there was any abstract rule to govern these cases, or whether I ought not, as Lord Eldon did, to look at the state of the capital at the time of the testator's death, and the nature of the trade, before deciding upon the rights of the parties. Suppose the case of a man with a capital of 20,000*l.* and no skill, and he takes in a partner with a capital of only 100*l.*, but of great skill; the new partner does all the business of the firm, and dies: could it afterwards be said that his family might come in and claim the whole share of the profits? Suppose in this case it should turn out that the trade of a frame-maker depended mostly on personal skill; that the capital was only 100*l.*, and the profits 1,000*l.* a year; one partner dies, and the concern is carried on afterwards: could it be the principle of this Court to give to the estate of the deceased 1,000*l.* a year in such a case? I think these are the kind of cases that Lord Eldon had in his contemplation, when he took the course he did. In every case except *Cook v. Collingridge*, the Court directed an inquiry as to the state of the partnership assets and capital, before decreeing an account of the profits.

Jan. 12, 1842. — WIGRAM, V.C. — After carefully reading through the cases referred to in the argument, I remain of the opinion I expressed before, that there is no rule of this court applicable alike to all cases of this description: the facts of each case must be under the view of the Court, before it can be in a position to decide what justice to all parties requires. No one can read with attention Lord Eldon's elaborate judgment in *Crawshay v. Collins*, *Cook v. Collingridge*, and *Brown v. De Tastet*, without being satisfied that his mind was impressed with the impossibility of submitting cases so various as these of trading partnerships to one universal rule. The decrees of Lord Eldon in those cases, and of Sir W. Grant in *Featherstonhaugh v. Fenwick*, of Lord

Langdale and Lord Cottenham in *Wedderburn v. Wedderburn*, establish the soundness of that proposition. Nor can the question be considered even abstractedly from authority, without its being evident that justice would be endangered by such an attempt. The circumstances of some cases would, indeed, almost exclude the possibility of making a decree on any other terms than those which are insisted on in this case. Take the very case suggested by Lord Eldon in *Crawshay v. Collins*, of a conversion into money at a large profit, long after the testator's death, of property which belonged to the partnership at his death, with no other circumstances to embarrass the question. Again, take the case of a dissolution of partnership, and a division of the profits on a new contract being made: before the old accounts can be wound up, one partner dies; in the absence of circumstances to alter the case, it would be impossible to deny the right of the estate of the deceased partner to participate in the profits on the winding up of the old concern. If in such a case the surviving partner could say that he had mixed up the old with the new dealings, that the two accounts should not be separated, the right of the estate of the deceased partner to share in the profits of the new concern would inevitably attach. In another case, a partnership may be formed, the substratum of which may consist of particular things, as patents or inventions the property of one partner. The profits may have been wholly or principally from contracts subsisting at his death, and not completed till afterwards; or contracts may be entered into after his death, of which his specific property may have been the main source. In such a case, in the absence of special circumstances, it would be difficult to suggest the principle on which the estate of the deceased partner should be refused the same proportion of the profits as he enjoyed, or would have enjoyed, during his lifetime. This appears to have been the ground of Lord Eldon's ultimate decision in *Crawshay v. Collins*. Again, the whole or a substantial part of the trade may consist of good-will. In such a case, the good-will is the identical source of profit which operates both before and after the dissolution. This appears to have been the ground of Lord Eldon's judgment in *Cook v. Collingridge*.

But put the case of a business the profits of which are made by the use of money, and personal exertion and attention alone. Such a case may require a different determination. In *Brown v. De Tastet*, the decree is different from that in *Crawshay v. Collins*; and *Featherstonhaugh v. Fenwick* is to the same effect. If two partners are interested in the profits in equal proportions, the one a builder finding capital, the other an architect supplying skill alone; and the latter before his skill has established a connexion should die, and the survivor, by his agents, should carry on the concern on the partnership premises, it could scarcely be contended, that after a lapse of years the estate of the deceased partner, who had contributed no capital and no skill, was entitled to a moiety of the profits made during such a lapse of years. If his estate would not be so entitled where the deceased partner had no capital, it would be difficult to establish a right to a moiety or other portion of the profits, only because there was some small share of the capital to which he was entitled at his death, without reference to the amount or the other circumstances of the case. If on the other hand the skill of the individual had been exercised as a partner in the concern, until it had created a connexion and good-will; and if on his death the surviving partner, instead of giving to his estate the benefit of that good-will, by a sale of the concern, should think proper to carry on the concern for his own benefit, it would not be difficult to justify a decree which in such a case should declare the estate of the deceased partner entitled to a share of the profits accrued after his death.

Again, if the amount of the capital were to be taken as the sole basis on which the profits are to be calculated, much injustice might arise. Suppose a partnership, in which the agreed capital is generally constant, notwithstanding one partner may make advances to, and the other abstract money from, the concern; if, at the death of the acting partner, he had abstracted money from the concern exceeding the amount of his stipulated capital in it, it would not be just to hold that his right to participate in the profits, after his death, should continue to the same extent as if his accounts with the partnership were straight, and he had given his time and attention to the business. On the

whole, I feel bound, by authority, to hold that the nature of the trade, the mode of carrying it on, the amount of capital employed, the state of the accounts between the partnership and the deceased partner at his death, and the conduct of the business after his death may materially affect the rights of the parties. I must, however, have more information than I now possess, before I can safely decide this case.

Feb. 22.—The decree, after directing the usual accounts of the testator's estate, and his debts and legacies—an inquiry, as to the children, and what money had been advanced to G. Willett the son, in respect of his share, proceeded as follows:—"And it is ordered, that the Master do take an account of the partnership dealings and transactions between the said testator and the defendant Blanford, up to the death of the testator, in regard to each of the businesses of a picture-frame-maker and a carver and gilder, in the pleadings mentioned; but in taking the said accounts, the Master is not to disturb any account that he may find to have been settled between the said parties; and in taking such account, the Master is to take an account of the amount of profits drawn out in each year by each of them, the said testator and Blanford; and to ascertain and state the amount of capital of each of them, the said testator and Blanford, in the said businesses, and to calculate interest thereon, at the rate of 5l. per cent. per annum. And it is ordered, that the Master do take an account of the property and effects, debts and credits, employed in, or of or belonging or due to, and the debts due from, or the liabilities of each of the said businesses, at the death of the testator. And it is ordered, that the said Master do ascertain and state the amount of the capital of each of them, the said testator and Blanford, in each of the said businesses, at the time of the death of the testator. And it is ordered, that the Master do ascertain and state of what stock in trade each of the said businesses consisted, and the respective values thereof; and also the value of the good-will of each of the said businesses, at the death of the testator. And it is ordered, that the said Master do inquire and state if anything, and on what account, was due to the said testator at his death, from the said

businesses, or either and which of them, or from the said Blanford, in respect of such businesses, or either and which of them, exclusive of his, the said testator's, share of or in the capital and stock in trade of such respective businesses. And it is ordered, that the said Master do take an account of the amount and particulars of the capital from time to time employed in each of the said businesses since the death of the testator, and by whom and when and in what manner the same respectively has been supplied, and also an account of the amount of profits made in each of the said businesses in each year since his, the said testator's, death. And it is ordered, that the said Master do take an account of all sums of money which, since the death of the testator, have been retained or paid, or taken, either on account of profits, capital, or otherwise, out of each of the said businesses, or either, and which of them; and the respective times when, and by whom, and to whom, and for what purpose, other than such sums as have been paid on account of such businesses, in the ordinary course of carrying on the same. And it is ordered, that the Master do compute interest after the rate of 5l. per cent. on all such sums, from the respective times the same were retained, or paid, or taken. And it is ordered, that the Master be at liberty, at the request of any party, to state such special circumstances, as to him should seem material, as to the nature of each or either of the said businesses, and the manner of carrying on the same, as well in the lifetime of the testator as since his death, for the purpose of shewing how far each or either of the said businesses may have depended on the personal skill of the said testator and Blanford, or either of them. And it is ordered, that the said Master do inquire and state to the Court, whether, since the death of the testator, any and what alterations have been made in the partnership house and premises in Bouverie Street, and by whom, and what money has been expended in making the same, and by whom, and how, or out of what fund paid or supplied; and the Master is to be at liberty to state special circumstances in relation to any of the inquiries and accounts before directed; and this Court doth declare, that all such inquiries and accounts are directed without prejudice to any questions relating

to the same, or in the cause. And for the better taking the accounts, and discovery of the matters aforesaid, the parties are to produce books, &c., and to be examined upon interrogatories, as the said Master shall direct, who, in taking the said accounts, is to make unto the parties all just allowances. Further directions and costs reserved till the Master should have made his report; with liberty to any party to apply.

WIGRAM, V.C. }

Nov. 23, 24; }

Dec. 3. }

TAYLOR v. CLARKE.

Partnership—Tenant for Life—Conversion—Income.

By articles of partnership between A. & B, (wine merchants at Oporto,) it was provided, that in the event of A. dying within the term, and at a certain period of the year, the concern was to be carried on some months longer; and that at the close of the partnership, B. was to have three years to pay A's share of the capital, with interest at 5l. per cent. A. died during the term, and by his will gave all his residuary estate to his trustees and executors, in trust to get in and invest in the English funds, &c., and to pay the interest to his wife for life, with remainders over; with a power to his trustees to grant to B. an extension of the time of payment. On a bill by the widow claiming the actual profits and interest accruing from the property in Oporto since A's death:—Held, that she was entitled from A's death to dividends on so much 3l. per cent. stock as would have been produced by the conversion of the property at the end of one year.

By the settlement made on the marriage of J. Charles Taylor, (the testator,) with the plaintiff, dated the 20th of September 1831, 5,000l. 3l. per cent. consolidated Bank annuities, the property of J. C. Taylor, and 5,000l. like annuities, the property of the plaintiff; and also all her interest under the will of J. R., deceased, were assigned and transferred to trustees, upon trust, for the separate use of the plaintiff during the joint lives of the husband and wife; remainder to the survivor of them for life. And after providing for the issue of the marriage which entirely failed, the ulti-

mate trusts were declared, as to the property settled by the husband, for him, his executors, &c. absolutely ; and as to the property settled by the wife, as she should appoint by deed or will, and in default of such appointment for her next-of-kin. And J. C. Taylor therein covenanted, that in case of the plaintiff surviving him, his heirs, executors, or administrators should pay to the plaintiff an annuity of 300*l.* for her life. In June 1836, Taylor agreed to enter into partnership with John Fladgate, of Oporto ; and articles of partnership of that date were executed by them respectively, containing, among other things, the following stipulations :—" That the said partnership should commence on the 1st of July 1836, and continue nine years ; and be carried on under the firm of Joseph Taylor & Co., for the first two years ; and under the firm of Joseph Taylor, Fladgate, & Co., for the residue of the term ; that the capital of the partnership should consist of the following amount, and be distributed in the following proportions, viz. during the three first years 80,000 florins, of which three-fourths should be contributed by Taylor, and one-fourth by Fladgate ; that interest at the rate of 5*l.* per cent. should be a charge both on the debit and credit side of all accounts ; and interest at that rate should be allowed to either partner upon any amount of capital actually advanced by him beyond his required share ; that in case of the death of either partner at any period between the 1st of January and the 30th of June, the business should be continued on the same footing, until the 1st of July then next, and the annual balance be then struck as usual ; but that, on the death of either of them at any other period of the year, the partnership should close on the day of such death, and a valuation should, after such death or the close of the partnership, be made of the stock and property then belonging to the partnership, by two persons to be named respectively by the surviving partner, and the representatives of the deceased, &c., and the last annual account of the said partnership should, upon such valuation, be binding upon both parties. And in case J. Taylor should die during the first five years of the term, his share in the capital stock and profits of the partnership at the time of his death, should be paid by Fladgate to

the representatives of Taylor, by three equal instalments at the end of the first, second, and third year, from the day of the death of Taylor, or from the end of the current year, for which the partnership should be so continued, as before provided, together with interest thereon, at the rate of 5*l.* per cent. per annum, to be calculated from the expiration of one year from the termination of such partnership ; the book debts due to the firm at the time of Taylor's death to be considered as part of the profits, but not to be divisible till received. The partnership business was continued in pursuance of the articles, until the 1st of July 1837, when, by the decease of J. C. Taylor, in the early part of January preceding, it virtually determined.

J. C. Taylor, by his will, dated the 3rd of January 1837, after directing payment of his debts, &c., and confirming his marriage settlement, directing a sufficient portion of his personal property to be invested to secure the annuity of 300*l.*, thereby agreed to be given to the plaintiff, and giving certain pecuniary legacies, gave his money, securities for money, money in the foreign or English funds, stock in trade, and all the rest and residue of his estate and effects, real and personal, and of what nature or kind soever, and whether situate in Great Britain, the kingdom of Portugal, or elsewhere, unto M. Clark, Thomas Philpotts, R. Woodhouse, and M. Leach, their heirs, executors, &c., upon trust, as soon as conveniently might be after his decease, (subject to the discretionary power thereafter given to his executors as to his partnership property,) to sell and convert into money, or otherwise collect, get in, and receive his said real estate (if any), and all such part of his personal estate as should not consist of money, or money in the English funds, and to stand possessed of the monies to arise by such sale, conversion, or collection, as aforesaid, and also of so much and such part of his personal estate as should consist of money, or money in the English funds, at the time of his decease, after satisfying the several directions thereinbefore contained, upon trust to lay out and invest all such parts of his residuary estate as should not consist of money in the English funds, or real securities in Great Britain, bearing interest, in such government or real securities, in the

names of the said four trustees, or the survivors, &c., and to stand possessed of the same, upon trust to permit his wife, the plaintiff, to receive the interest, &c., for her life, for her separate use; remainder, in case there should be any issue of the marriage, upon the trusts declared in his marriage settlement concerning the sum of 5,000*l.* settled by him; and in case of failure of such issue, upon the trusts by his said will declared concerning the same. And the testator, after reciting the articles of partnership between himself and Fladgate, declared that his executors should and might have full power and discretion, and he fully authorized them accordingly to allow and afford unto Fladgate any further extension of time for the payment of any proportion of the capital out of his said business, beyond the period fixed by their terms of partnership, not exceeding in the whole the period of five years from his decease; for which extension his executors should not incur any personal responsibility whatever, but the same should be given in such manner, and upon such security as they should think reasonable and proper, unless they should see any good reason to refuse such extension. And the testator appointed his four trustees his executors. Nearly the whole of the testator's property was, at his death, invested in the partnership stock in Portugal; when on a valuation taken in July 1837, the testator's share in the said business was found to amount to 46,865*l.* sterling. In May 1839, the testator's widow filed her bill, to have the trusts of the will carried into execution, claiming, as tenant for life of the whole of the residuary estate of the testator, to be entitled to all monies received by the executors, whether arising from the profits of business, or from interest of capital invested in foreign or government or real securities since the testator's death.

Mr. Temple and *Mr. Harrison*, for the plaintiff.—The funds, while in the hands of Fladgate, were in a proper state of investment, the testator having given his executors a power to continue them in Portugal for five years. The widow is consequently entitled to all the income derived therefrom, which has come to the hands of the executors.

Douglas v. Congreve, 1 Keen, 410; s. c. 6 Law J. Rep. (n.s.) Chanc. 51.

Hewitt v. Morris, Turn. & Russ. 241; s. c. 2 Law J. Rep. Chanc. 87.

In *Angerstein v. Martin* (1), the tenant for life was entitled, from the death of the testator, to the proceeds of money invested in the Russian funds—*Holland v. Hughes* (2).

Mr. Sutton Sharpe, for the parties entitled in remainder.—By the will, no interest is given to the tenant for life, till the conversion into the English funds; and with good reason, for the widow was otherwise well provided for. But if the Court is adverse on that point, the widow will only be entitled to interest on the funds, as if they had been properly invested—*Dimes v. Scott* (3). In *Angerstein v. Martin*, Lord Eldon does not notice the fact of the property being in the Russian funds; and that case is inconsistent with *Hewitt v. Morris*.

Mr. Lowndes and *Mr. Beales*, for the trustees, who were also contingently interested, contended, that the widow was not entitled to the profits actually made, but only to an income after the first year, calculated upon what the property would have produced, if realized and properly invested.

Sitwell v. Bernard, 6 Ves. 520.

Fearn v. Young, 9 Ibid. 549.

Mr. Temple, in reply.—It would be an extreme thing to say that the widow is to have no income at all, and that all the interest is to go to the secondary objects of the testator's bounty, *i. e.* the tenants in remainder. At all events, the widow is entitled to the actual profits from the end of one year after the testator's death—*Vickers v. Scott* (4).

Nov. 3.—WIGRAM, V.C.—In some cases it is impossible for executors to get in the property in a reasonable time; in other cases it might be attended with a ruinous loss to the estate; in others, again, the different degrees of diligence in executors might materially affect the interest of a legatee for life, as in the case of *Sitwell v. Bernard*, and might affect also the interests of those in remainder. To obviate

(1) Turn. & Russ. 232; s. c. 2 Law J. Rep. Chanc. 88.

(2) 16 Ves. 111.

(3) 4 Russ. 195.

(4) 3 Myl. & K. 500; s. c. 3 Law J. Rep. (n.s.) Chanc. 226.

these and other inconveniences, the Court has been in the habit of considering the property as converted at the end of one year, and giving to the tenant for life the income he would have had, if the property had been invested. That rule must be applied here, unless the language of the will is incompatible with the general rule. But I do not think it is countervailed by the direction to invest a particular portion of the estate. In *Sitwell v. Bernard* it was held, that the tenant for life was entitled, at least at the end of one year, to an income computed upon the supposition that the property had been wholly converted. Excluding, for the present, the question, whether the tenant for life is entitled to the income of the property in Portugal for the first year, I will next consider the widow's claim to have the actual income of that property after the expiration of the first year. This claim is untenable.

The argument in support of it was, that the testator having directed the property to remain in Portugal for a limited time, that property must be considered as in a proper state of investment while in Portugal; and that if the investment was proper, the tenant for life is entitled to the income. But this reasoning cannot be supported. I cannot treat this direction as of the essence of the will, and treat as directory merely that part of the will which excludes the plaintiff from taking the benefit till investment; it is only by considering the investment as secondary, that the tenant for life can get at the income before the actual investment. I am of opinion, therefore, that, for the purpose of determining the amount of the income of the widow, the property in Portugal must be considered as converted and placed in a proper state of investment. I am only speaking of the mere income, and not that she can necessarily demand payment to that amount till it is got in; for it may be eventually lost. The remaining question is one of great difficulty; viz. what is the right of a tenant for life of a residue, directed to be invested in a particular manner. There are four propositions, and high authorities in support of each. According to Sir J. Leach, in *Stott v. Hollingworth* (5), and Sir T. Plumer, in *Taylor v. Hibbert* (6), the tenant for life

of a residue is not entitled to the income till the expiration of a year; and it is extremely difficult to interpret the language of Lord Eldon in *Sitwell v. Bernard*, so as not to support the same opinion. According to the opinion of Sir A. Hart, in *La Terriere v. Bulmer* (7), the tenant for life is entitled to the income, for the first year, of such parts of the testator's estate as were invested upon proper securities, at the time of the testator's death, and of such parts as should be properly invested during such year, but not to the income of the other parts. In *Angerstein v. Martin*, Lord Eldon gave the tenant for life of a residue, directed to be invested, the income of such parts as were upon securities bearing interest, from the death of the testator. Part of the property was in Russian funds, which was clearly not a proper investment; yet Lord Eldon made no distinction as to that. In *Douglas v. Congreve* (8), the Master of the Rolls gave the tenant for life the income during the first year, without reference to investment. In the absence of authority, I should have thought that the distinction in *La Terriere v. Bulmer* was right; and that *Angerstein v. Martin* did not intend to impeach the law. Every word of Lord Eldon applies to a fund in a proper state of investment. The testator gave the produce of the land from the moment of the purchase, and gave the income till the land was purchased. How can his argument apply to the income of property not invested in the interval between the death and the time of the purchase. When the Court, in common equity, treats the property as converted, it gives the tenant for life that income only which the testator intended. If the tenant for life is to take the actual income, she will get more than the testator intended. I cannot think that Lord Eldon's attention was called to the Russian funds, for not one word of the case was directed to these funds. In *Dimes v. Scott*, Lord Lyndhurst held, that a tenant for life of a residue was only entitled to the dividends of so much stock as would have been produced by the conversion, at the end of a year from the testator's death. Lord Langdale, by following Lord Eldon, has left the law in a state of uncertainty, and

(7) 2 Sim. 18.

(8) 1 Keen, 410; s. c. 6 Law J. Rep. (N.S.) Chanc. 51.

(5) 3 Mad. 161.

(6) 1 Jac. & Walk. 308.

there are now four classes of decisions, giving four different rights. I am therefore placed in this embarrassing situation, that I can make no decision without overruling one or more of these cases. If I were to express my own unfettered opinion, I should say, that the decision in *La Terriere v. Bulmer* was right, and that *Dimes v. Scott* was to be regretted. To give to the tenant for life the income for the first year, of funds properly invested, is according to the testator's expressed intention. To give the tenant for life, as in *Douglas v. Congreve* and *Angerstein v. Martin*, the actual income without reference to investment, is to give him what the testator never intended to give him. To postpone it for a year is merely assimilating the case of a residuary legatee to another legatee. To give the tenant for life the income for the first year, calculated upon a supposed investment, is to make a distinction between a residuary legatee and another legatee—*Dimes v. Scott*, so far as that is concerned, is a case of the first impression. Lord Langdale's judgment overrules it. In this conflict of authorities, I feel bound to follow the decision of the Lord Chancellor in *Dimes v. Scott*, though that case introduced a distinction where there was no substantial difference. I cannot conclude my observations without expressing a hope that the amount of the property in question may be such as to make it worth the while to carry it to a higher tribunal.

WIGRAM, V.C.
1841.

Dec. 23, 24.
1842.

Jan. 12.

WILKINSON v. PAGE.

Arbitration—Award—Order of Court.

A motion to make an award an order of court must be made upon notice; and the party intending to impeach the award must then give notice of a cross motion for that purpose. The award, when once made an order of court, is conclusive.

The bill was filed by the plaintiff for a dissolution of partnership; and by consent an order of reference to arbitration was made in the cause, and liberty was reserved to either party to apply to make the award an

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order of court. The arbitrator awarded a certain sum of money to be paid by the plaintiff on or before the 1st of January 1842.

The defendant then gave notice of motion, that the award might be made an order of court, and that the defendant might be ordered to pay the money by the day named in the award. It was stated, that the secretary at the Rolls had refused to give out the order as of course, and it appeared that an affidavit was required at the office, or a consent brief.

Mr. Wood and Mr. Willcock, for the motion.—The proper course is to give notice of the motion, which must be supported by an affidavit. If the other side object to the award, they may then impeach it by a cross motion. Two cases have occurred at the Rolls in the course of last year, in both of which the motion was made upon notice.

Cunningham v. Cunningham, and

Jones v. Baynton, (not reported.)

If they allow the award to be made a rule of court, they cannot afterwards come by a cross-motion to set it aside, or take exceptions to it.

Price v. Williams, 3 Bro. C.C. 163.

Knox v. Symmonds, 1 Ves. jun. 369.

If an affidavit is necessary, the order cannot be of course. We are entitled, at all events, to an order for payment without making the award a rule of court—*Ormonde v. Kynnersley* (1).

[WIGRAM, V.C.—Was the application there before the day of payment?]

The order made was for the payment of the money according to the award.

Mr. Sutton Sharpe and Mr. Anderdon, contra.—The books of practice do not distinguish between an order made under the authority of the Court, and an award made by the submission of the parties to arbitration; in which case the jurisdiction attaches by the statute. It is quite clear, that if parties out of court agree to refer the matters to arbitration, before the Court can have jurisdiction over the award, it must be made a rule of court; and that has always been considered a motion of course. The defendant cannot ask both things; he must either ask that it may be made a rule of court, or, in substitution of that, for an order for payment of the money, pursuant to the award.

(1) 2 Sim. & Stu. 15; s.c. 2 Law J. Rep. Chanc. 178.

2 C

But in *Salmon v. Osborne* (2), the Court would not allow the money awarded to be paid out of court, before the award was made a rule of court. The award must be made a rule of court for the purpose of having a *constat* upon the record, and after that, when the plaintiff comes to enforce it, the opposite party may impeach it by a cross-motion—*Smith v. Symes* (3); but the Court will not allow a party to come for an order in the first instance, on which to ground a contempt, before it is known that the award will be disobeyed. But it is not at all necessary that it should be made a rule of court in order to give the Court authority over it—*Haggett v. Welsh* (4).

Mr. Wood, in reply.—*Smith v. Symes* does not apply, as that was a case under the statute. In this case, the usual order of reference gives the party liberty to apply to make the award a rule of court—*Seton on Decrees*, 378, (n. 5.) The award cannot be made a rule of court without some *constat*; and, therefore, the affidavit is necessary to verify the award as an exhibit. The words of the notice of motion, "That the party may be ordered to pay," &c., are mere surplusage, the making the award a rule of court having the same effect. According to *Knox v. Symmonds*, the other side ought, at this stage, to have given notice of a cross-motion.

WIGRAM, V.C.—If the Court makes an order, that the award be one of its own orders, then that would seem to confirm the award, and the party could not impeach it afterwards, without discharging the order making it an order of court. But there seems great confusion at present as to what is the right stage for making the cross-motion. If I should be of opinion, that the motion is regular, the defendant will be entitled to his order as of to-day, and will be in a condition to enforce it on the first day of next term. It is right, however, that I should give the other party an opportunity of making a cross-motion on the first day of next term; but upon the terms of putting the plaintiff right in point of time, and submitting to such time of payment as I shall appoint.

(2) 3 Myl. & K. 429; s. c. 3 Law J. Rep. (n.s.) Chanc. 237.

(3) 5 Mad. 74.

(4) 1 Sim. & Stu. 134.

Jan. 12.—WIGRAM, V.C. held, that the defendant's motion was regular in point of practice; but, for the reasons above stated, gave the plaintiff leave to give notice of a cross-motion to impeach the award.

WIGRAM, V.C. }
Jan. 26, 31. } APPLEBY v. DUKE.

Practice.—Costs—Provisional Assignee—Foreclosure.

A provisional assignee, who is made a defendant to a foreclosure suit, is not entitled to have his costs from the plaintiff, even though he disclaims by his answer, and has no assets of the insolvent's estate in his hands.

This was a foreclosure suit. One of the parties interested in the equity of redemption, had taken the benefit of the Insolvent Debtors Act, and the provisional assignee, who was made a defendant, put in his answer, stating that he did not claim any right or interest in the matters in question, save such, if any, as might be vested in him, as such assignee, in trust for the creditors of the insolvent. The sole question was, as to the costs of the provisional assignee.

Mr. Chandless, for the mortgagee.—The provisional assignee cannot, in any event, call upon a mortgagee, with an insufficient security, to pay him his costs. But not having disclaimed, he is not entitled to his costs—*Clark v. Wilmot* (1).

Mr. Reynolds, for the provisional assignee.—The provisional assignee, in point of duty, ought not to disclaim upon the record; for by that proceeding, he might bar the rights of the creditors, without sufficient evidence as to the state of the property. As a public officer, he ought to have his costs; for he has stated in his answer, that he has no assets of the estate in his hands, and consequently the costs, if not paid by the plaintiff, will fall upon him personally.

Woodward v. Haddon, 4 Sim. 606; s. c.

1 Law J. Rep. (n.s.) Chanc. 106.

Boswell v. Tucker, 1 Beav. 493.

Peake v. Gibbon, 2 Russ. & Myl. 354;

s. c. 9 Law J. Rep. Chanc. 168.

Mr. Smythe, for the other defendants.

Mr. Chandless, in reply.

(1) *Ante*, p. 16.

WIGRAM, V.C.—I have a strong impression, that Lord Cottenham recently decided that the provisional assignee was not entitled to his costs in such a case, saying, however, that it was a fit case for the interference of the legislature. I will not decide the question without examining that case.

Jan. 31.—WIGRAM, V.C.—This is a bill filed by a mortgagee to foreclose, against a mortgagor who has become insolvent and whose interest in the equity of redemption is vested in his assignee. The decree of foreclosure must be made; and the only question is, whether the provisional assignee is to have his costs paid him by the mortgagee, who is to add them to his debt. The provisional assignee has not disclaimed, but has filed an answer, which made it indispensably necessary for the plaintiff to bring the suit to a hearing against him. It has been argued for the provisional assignee, that regard being had to his duty as a public officer, he ought not to disclaim, till he has ascertained whether the estate is worth redeeming or not—a proposition which I am not called upon to consider; having only to decide whether, if a provisional assignee incurs costs by doing so, he is entitled to call upon the mortgagee to pay him. The mortgagee objects to pay him his costs, even upon the terms of adding them to his debt; suggesting that he has advanced as much money as the security is worth, and that the Court ought not to compel him to increase his advances. Whether the security is not more than sufficient, I do not know; it is enough for me to know, that the suggestion may be true, in order to decide the question of costs, with due regard to principle and authority. Upon principle, there is no doubt. In equity, the estate belonged to the mortgagor (if solvent) upon the terms of paying the mortgagee his principal, interest, and costs. It is clear, that the mortgagor, if solvent, could not call upon the mortgagee to pay him his costs; nor could an assignee for value; nor an assignee in bankruptcy, though there the proceedings are *in invitum*. Upon what plea then can the mortgagor, by claiming the benefit of the Insolvent Debtors Act, vary the ordinary rights of the mortgagee, by requiring him to make further advances in the shape of costs? But authorities were referred to, by which, if they

stood alone, I should feel bound—*Peake v. Gibbon*, *Woodward v. Haddon*, *Boswell v. Tucker*. But those cases do not stand alone, and cannot be supported upon principle. In *Hunter v. Pugh* (2), a late case before Lord Cottenham, I successfully resisted the claim of the provisional assignee,—a claim rested by his counsel upon the same grounds and the same authorities. Mr. Reynolds there asked, that the costs of the provisional assignee should be provided for. Lord Cottenham said, that if there was an established rule, he would not alter it, but he must inquire into the practice. The case stood over for three months, and on the 7th of March following, the Lord Chancellor decided, that the provisional assignee should not have his costs. The assignee there filed a short answer, in which, after stating the proceedings in the insolvency, he submitted to the judgment of the Court, whether the estate and effects of the insolvent were not transferred to him as such assignee, in trust for the creditors of the insolvent debtor, whose rights and interests he submitted to the care and protection of the Court—"nevertheless, the defendant does not claim any interest in the matters in question, other than such estate as is vested in him as such assignee, in trust, as aforesaid;" and in a subsequent passage he says, "he is a stranger to the other matters, and submits to act as the Court shall direct." There was a public officer, upon whom the law had cast a duty, and who merely appeared and submitted; and that was a case upon the construction of a will, upon which there might be some ground to say costs ought to be given; but in the case of a mortgagee, it is a much stronger proposition to say, he shall make an additional advance upon his security. At the time *Hunter v. Pugh* was decided, I understood Lord Cottenham to express a decided disapprobation of the principle of the cases cited at the bar. I may observe, that no Judge (unless Sir J. Leach is an exception) before whom the point was argued, appears to have been satisfied with the principle of those cases; and Sir J. Leach himself was not always uniform in his decisions, as appears by the case of *Collins v. Shirley* (3), as cor-

(2) Not reported.

(3) 1 Russ. & Myl. 638.

rected in *Thompson v. Kendall* (4). The ground of the decision in *Hunter v. Pugh* is, that the assignee and the insolvent stand in the same position, and neither one nor the other have any right to impair the security of, or increase the charge on the mortgagee. I observed that the provisional assignee had not disclaimed. I do not mean by that expression to intimate that, if he had, it would have made any difference; my judgment proceeds upon the general principle, that the mortgagee has a right to retain his security unimpaired till he is paid his principal, interest, and costs. My decision may, therefore, be appealed from, if erroneous, though it involves only a question of costs; but I am not to be understood as recommending an appeal, or as doubting the correctness of the conclusion that I have come to. When *Hunter v. Pugh* was decided, Lord Cottenham said, that he thought that the Judges had each followed the decisions of the others, though all disapproved of them; but, that he not being bound by those decisions, would decide the case upon principle, and not give the provisional assignee his costs.

WIGRAM, V.C. }
 Jan. 31; } CASH v. BELCHER.
 Feb. 8. }

Practice.—Bankrupt—Official Assignee—Costs—Foreclosure—Disclaimer.

The official assignee of a bankrupt mortgagor, who is properly made a party to a foreclosure suit and disclaims, is not entitled to have his costs up to the time of his disclaimer paid by the plaintiff. And the plaintiff not being able to dismiss him upon the coming in of the disclaimer, except upon the terms of paying his costs, he is not entitled, as against the plaintiff, to have his costs of being brought to a hearing.

This was a foreclosure suit by the first mortgagee, against the second mortgagee and the official and creditors' assignees of the mortgagor, who had become bankrupt.

The answer of the assignees was as follows: "These defendants say, that between the appointment of the defendants as assign-

(4) 9 Sim. 399; s. c. 9 Law J. Rep. (N.S.) Chanc. 318.

nees, and the filing of the bill, these defendants were not able to obtain sufficient information with respect to the value of the equity of redemption; but that if the plaintiff had granted a short delay, the defendants would have discovered that the premises were mortgaged for more than their value, and defendants would have released the equity of redemption therein to the plaintiffs, if they had been applied to for that purpose; but no application was ever made to defendants; and defendants do not now claim any right to the said mortgaged premises or any part thereof; and that defendants have no estate of the bankrupt to pay the costs of this suit."

Mr. F. Bayley, for the assignees, relied on the case of *Thompson v. Kendall* (1), as similar in its circumstances to the present case.

Collins v. Shirley, 1 Russ. & Myl. 638.

Woodward v. Haddon, 4 Sim. 606; s. c.

1 Law J. Rep. (N.S.) Chanc. 106.

Mr. Wood, for the second mortgagee, cited—

Barry v. Wray, Beames on Costs, App. 392.

Boswell v. Tucker, 1 Beav. 493.

Mr. Steere, for the plaintiff.—The assignees were necessary parties to the suit, and the first mortgagee could not have had a title without them. Their disclaimer does not entitle them to have their costs from the plaintiff—*Fewster v. Turner* (2). The plaintiff could not have dismissed the assignees upon the coming in of their answer, without paying their costs.

Feb. 8.—WIGRAM, V.C.—In this case, the only question was, who ought to pay the costs of the bankrupt's assignees. In *Appleby v. Duke*, (vide ante, p. 194,) I had to consider the case of the provisional assignee of an insolvent mortgagor, made defendant to a foreclosure suit; and upon the authority of *Hunter v. Pugh* (3), I held that he was not entitled to have his costs from the plaintiff. In *Appleby v. Duke* and *Hunter v. Pugh*, the provisional assignee had not disclaimed. In the case now before me, the official as-

(1) 9 Sim. 397; s. c. 9 Law J. Rep. (N.S.) Chanc. 318.

(2) Ante, 161.

(3) Not reported.

signee has disclaimed in this sense—that he says, “the estate is mortgaged for more than its value, and therefore he disclaims all interest, &c. ; and that he would have released the equity of redemption, if an opportunity had been offered him.” It is obvious, that if the disclaimer does not shew that the official assignee was not a proper party to the suit at the time of filing the bill, the principle upon which *Appleby v. Duke* was decided, will apply to the costs of the official assignee, up to the time of putting in the disclaimer. But it was argued, that he was entitled to the costs of being brought to a hearing after he had disclaimed. I do not deny that there are cases in which a defendant who disclaims, may be entitled to claim his costs of suit if brought to a hearing, or who, having disclaimed, appears not to be a necessary party to the suit. I cannot, however, apply that principle to a case in which the defendant is properly a party to the suit, for the plaintiff must either have dismissed the bill against the official assignee, paying him his costs, upon the disclaimer being filed, or have brought him to a hearing ; and unless the case appears to be one on which it was obligatory on the plaintiff to dismiss the official assignee, and pay him his costs, I cannot hold that he did wrong in bringing him to a hearing. He had no other alternative. I acted upon this principle in *Fewster v. Turner*, and I see no reason for changing my opinion. The usual decree of foreclosure must be made.

V.C. }
Jan. 27. } STRICKLAND v. STRICKLAND.

Practice.—Bill of Revivor—Executor.

Where one of two executors has alone proved the will of a testator, it is only necessary to revive the suit against the executor who has proved.

Mr. Shadwell moved, on behalf of Sir George Strickland and George Meynell, Esq., executors of Eustachius Strickland, since deceased, one of the defendants in this suit, that the plaintiffs should be ordered, within fourteen days, to revive the suit against the executors of the deceased E. Strickland, or in default thereof, that the bill be dismissed as against them. It had been objected,

that Mr. Meynell not having proved the will of E. Strickland, and not having been a party to the cause, must be considered as a stranger to the suit, and could not move to have the bill revived as against him. Sir G. Strickland had alone proved the will, but that did not preclude Mr. Meynell, who was also an executor, from joining in this motion. The same thing had been done in the cases of—

Burnell v. the Duke of Wellington, 6 Sim. 461.

Adamson v. Hall, Turn. & Russ. 258 ; s. c. 1 Law J. Rep. Chanc. 91.

Froward v. Bingham, 4 Sim. 483.

Mr. Bethell, contrâ. — Everything has been done in this suit which could be required. The plaintiff obtained an order to revive on the 7th of January last against Sir G. Strickland, who is the only executor of the deceased defendant, who proved the will. The probate is the only evidence of who are the executors ; but if it were possible to say, that the executor who did not prove, ought to be brought before the Court, then it would be necessary that the other order, which would be imperfect, should be first discharged ; but there is no obligation to bring before the Court an executor who has not proved. An application was made by the plaintiff's solicitor, to ascertain who were the executors of the deceased defendant ; and an answer was returned, stating that Sir G. Strickland had alone proved the will.

Mr. Shadwell, in reply.—As to Sir G. Strickland having alone proved the will, the executorship arises from the will, not the probate ; and nothing has taken place to prevent Mr. Meynell being still an executor ; and if so, it is necessary the bill should be revived against him. The order of revivor, as to Sir G. Strickland, cannot now be got rid of, but at any rate that would not bind Mr. Meynell. Where there is a question of representation, it is necessary to bring all the executors before the Court, though, in some cases, you can have a remedy against any one executor who proves the will. In this case, Mr. Meynell has a right to have the suit revived, or dismissed, as against him.

The VICE CHANCELLOR.—I should be unwilling to discharge the order, founded

upon the well-known practice, that where a person has appointed two persons executors, it is considered sufficient to have that one who proved the will before the Court. He has made himself liable as to any act by the probate. Here is an affidavit, stating that the plaintiff applied to the defendant's solicitor for information, to know whether the will was proved so as to file a bill of revivor; and then information is sent, that it had been proved by Sir G. Strickland, and nothing else is mentioned; so it appears information was given which, I think, was sufficient, and on which the plaintiffs proceeded to revive the suit as far as Eustachius was concerned, against the sole proving executor. I think the motion should be dismissed, with costs.

V.C. }
Feb. 3. } STRICKLAND v. STRICKLAND.

Practice.—Costs.

The Master having made a report in favour of the plaintiffs, exceptions were taken to such report, which were allowed. An application was made for a reference, that the costs of those proceedings and of that application might be taxed and paid by the plaintiff to the defendant. Reference ordered in the terms of the notice of motion.

In this cause, the answer being referred for impertinence, the Master made a report in favour of the plaintiff. Upon exceptions to the Master's report, the Court was of opinion, that the Master was wrong, and allowed the exceptions.

Mr. Shadwell now moved, on behalf of the defendant, that the costs of the proceedings under the order of reference, and of the present motion, might be taxed by the Master and paid by the plaintiffs to the said defendant.

Mr. Bethell, contra.

The VICE CHANCELLOR (after having directed the application to stand over, in order that inquiries might be made by the registrar, as to the practice,) said—The registrar has supplied me with the papers in the two cases of *Desanges v. Gregory* (1) and *Everet*

v. Prythergh (2). In *Desanges v. Gregory*, the words were precisely the same as in the present case—viz. there had been a reference, and the Master had reported, in favour of it; then there were exceptions, and the Court determined against the Master, so that an application became necessary for a reference to tax the costs. The application was made, but in that case, the costs of the application were not asked for, and all the Court did was merely to comply with the request—viz. to refer it to the Master to tax the costs. In *Everet v. Prythergh*, the case was the same. The party first succeeded before the Master, and then failed on the exceptions; and the application was made on notice, that it might be referred to the Master to tax the plaintiff the costs of attending the reference, and also the plaintiff's costs of attending the application; and the order that was pronounced was according to the notice of motion. The order has not yet been drawn up; but that was the order pronounced. It appears to me, it is best to have uniformity of practice, and whichever settles it originally does not much signify; but I think, properly speaking, the costs a party is put to in obtaining his right, ought to be paid by the party who has done the wrong; and inasmuch as the plaintiff (or the party whoever it is making the application,) comes before the Court in consequence of a reference for impertinence, on which, though the Master thought with him, the Court, upon appeal, was against the Master, and in that sense it was wrong; it rather appears to me right to give the party who makes the application an order, that the Master shall tax his costs of the proceedings upon the matter, and also the costs of the application; therefore, I think, the order in this case should be made in the same way as the order in *Everet v. Prythergh*.

V.C. }
March 11, 18. } QUEEN'S COLLEGE v.
SUTTON.

Will—Legacy—Construction.

*A testator bequeathed 30,000*l.*, to the provost and "fellows" of Queen's College, Oxford, to be laid out within three years, in*

(1) Not reported.

(2) *Ante*, pp. 6 and 54.

books for the use of the college; the executor refused to transfer, except under the direction of the Court, on account of the testator having misnamed the college, which, in the charter, was styled provost and "scholars." Upon bill filed by the provost and scholars, it was held, that the plaintiffs were entitled to a transfer immediately—and to their taxed costs.—Held, also, that the time within which the books were to be purchased was not imperative.

In this case, Robert Mason, D.D., a member of Queen's College, in the University of Oxford, by his will, dated the 25th of September 1833, gave, devised, and bequeathed to the provost and fellows of Queen's College, in the University of Oxford, the sum of 30,000*l.* 3*l.* per cent. consolidated bank annuities to be by them expended within the space of three years next ensuing the date of his decease, in and for the purchase of such books for the use of, and to be added to the library of the said college, as they, the said provost and fellows of the said college for the time being, should in their discretion think fit; and after other devises and bequests, the said testator gave, devised, and bequeathed all the rest, residue, and remainder of his real and personal estate unto John Sutton, of Islington, stock-broker, and nominated and appointed the said John Sutton sole executor of his will. The testator died on the 7th of January 1841, without having revoked or altered his will, which was duly proved, on the 16th of January following, by the said John Sutton. The testator's personal estate was amply sufficient to answer the legacy to the provost and fellows of Queen's College, together with all other demands upon his estate. The executor having possessed himself of the testator's personal estate, the provost and scholars of Queen's College applied for a transfer of the legacy, bequeathed to them by the said Robert Mason, and set forth the letters patent, dated the 22nd of October, in the 26th of Eliz. in the year 1559, whereby the provost and scholars of Queen's College, Oxford, and their successors, were constituted a body corporate in perpetual succession, in deed and name, and had power to sue and were invested with a common seal; they also represented that the library of the college was held by

them in a corporate capacity, and was a collection of books given by many benefactors at different times to the college. The executor, John Sutton, having refused to transfer, unless under the direction of the Court, the provost and scholars filed their bill against him, which stated the foregoing facts, and prayed, that the defendant, upon admission of assets, might transfer the sum of 30,000*l.* into their names, and if not for an account, and for an account of what was due on the legacy for principal and interest. The defendant put in his answer, admitting assets sufficient for payment of the legacy, but stating, that as the application was made by the provost and scholars, and consequently in a different title to the bequest, which was to the provost and fellows, he was advised he could not safely transfer without the direction of the Court.

Mr. G. Richards and Mr. W. R. Williams, for the plaintiffs, cited—

Fontaine v. Tyler, 9 Price, 94.

Bethune v. Kennedy, 1 Myl. & Cr. 114.

Mr. Walker and Mr. Simpson, for the defendant, cited—

Webster v. Hale, 8 Ves. 410.

Mann v. Copland, 2 Madd. 223.

Roberts v. Pocock, 4 Ves. 150.

Smith v. Fitzgerald, 3 Ves. & B. 7.

The VICE CHANCELLOR.—This legacy is clearly specific, and plainly shews that the provost and fellows of Queen's College for the time being, are to exercise their discretion. There is no difference between this case and that of *Fontaine v. Tyler*. If the last words read came first, he would in effect have used the very words in that case. They could not exercise their discretion without having a fund to lay out; they are entitled to say, they are to have it from the day of the death. This legacy ought to have been treated as specific. I think the plaintiffs are entitled to the money from the time of the death of the testator.

Declare, the provost and fellows of Queen's College entitled to a transfer of the sum of 26,960*l.* 3*s.* 5*d.*; and to an account for the dividends from the time of the decease of the testator.

Order, the defendant to pay the plaintiffs' taxed costs.

The VICE CHANCELLOR also held, the direction to purchase books within the space of three years from the time of the decease was not imperative, as to the time within which the legacy should be laid out.

Pugh. Heath 51 & 56 & 57

M.R. }
March 14. } BAMPTON v. BIRCHALL.

Pleading—Distinct Pleas—Pleas of No Heir and Statute of Limitations.

A, as the assignee of B. under B's insolvency, filed his bill against C, who was in possession of certain real estates, claiming title thereto as the assignee of B, who was alleged by the bill to be the heir-at-law of D, who died seised of the estates upwards of twenty years previously to the filing of the bill. On the application of C, the Court allowed him to file two distinct matters as several pleas to the bill, viz. the pleas of no heir and of the Statute of Limitations.

The Court will allow two pleas to be filed to a bill, wherever such permission appears to be no disadvantage to the plaintiff, and is a convenience to the defendant.

The plaintiff in this case was the assignee under the insolvency of Thomas Standish, or Stanley, deceased, who took the benefit of the Insolvent Debtors Act in the year 1820, and was alleged by the bill to have been the heir-at-law of Sir Frank Standish, who died in the year 1812. The plaintiff claimed in right of the heir, and by his bill prayed a declaration that he was entitled to the estates of which Sir Frank Standish died seised; and he prayed for such relief, discovery, and accounts as he might be entitled to in right of the heir, and by virtue of the title which he claimed in that character. The defendants alleged, first, that Thomas Standish, or Stanley, was not the heir of Sir Frank Standish; and secondly, that even if he were such heir, the plaintiff's right to relief was barred by the Statute of Limitations.

Mr. G. Turner and Mr. Elmsley now moved, on behalf of the defendants, for leave to plead two distinct matters as several pleas to the bill, viz. that the plaintiff was not heir, and the Statute of Limitations, which was opposed by—

Mr. Pemberton and Mr. J. Johnson, on behalf of the plaintiff.

The MASTER OF THE ROLLS (after stating the facts of the case) pronounced his judgment as follows:—If the defendants were to plead singly that Thomas Standish, or Stanley, was not the heir of Sir Frank Standish, and the plaintiff should take issue on the plea, and succeed, the defendants would be precluded from pleading the Statute of Limitations; and the plaintiff having, in the case supposed, established his claim in right of the heir, would succeed in his suit, notwithstanding a good defence existed, to the benefit of which the defendants might be legally entitled. And although I apprehend that the defendants might plead the Statute of Limitations, and fail in maintaining it, without precluding themselves from the defence of no heir, yet in the case thus supposed it would be necessary for them either to apply to the Court for leave to plead "no heir," after failure of the first plea, or to make a defence by answer, at the risk of being obliged to give the discovery and set out the accounts, to which the plaintiff has no claim whatever otherwise than in right of the heir, which is in question.

I think the question whether the defendants should be allowed to plead several pleas, depends on the nature of the case, and the convenience which may attend one or other course of proceeding. I have not succeeded in finding any instance in which two several pleas of the kind now proposed have been permitted; but upon consideration, I find no reasonable objection to them. Each of them may be a complete defence to the bill. If Thomas Standish, or Stanley, was not heir, the plaintiff has no title. If the title in which the plaintiff sues accrued at such a time, and was so neglected that the Statute of Limitations bars the remedy, the plaintiff cannot recover; and in pleading the Statute of Limitations, it is not necessary to admit that the plaintiff has, or ever had, any such title. And it appearing to me that it would be no disadvantage to the plaintiff, and a great convenience to the defendants, that the defences should be put in in the form of pleas, in order that their validity may be considered before a discovery is enforced, I think that leave must be given to plead as desired, the defendants paying the costs of the application.

WIGRAM, V.C. }
 Nov. 6, 10, 1841. } SALKELD v. JOHNSTONE.
 Feb. 8, 1842. }

Tithes—Endowment of Vicarage—Proof—Exemption—2 & 3 Will. 4. c. 100—Construction—Disclaimer.

Where the old terriers tend to negative the vicar's right to all small tithes, the perception by the vicar of all the small tithes that have ever been rendered in the parish, will not be held evidence of an endowment of the vicarage with "all" the small tithes.

The 2 & 3 Will. 4. c. 100. did not raise a new ground of exemption from tithes: consequently, in pleading that statute, it is still necessary to shew a legal origin of the exemption, &c. Proof of non-payment alone for any length of time, will not be sufficient.

Bill by vicar for certain small tithes. The rector, a defendant, disclaimed. Account of tithes decreed to vicar, but title not established.

The original bill was filed by the vicar of the parish of Crosby-upon-Eden, for an account of certain small tithes of modern introduction, enumerated in his Honour's judgment, against the occupiers of lands in the parish. The defendants, by their answer, set up that the title to these tithes was in the rector. The bill was then amended by making the rector a party defendant. The rector by his answer disclaimed. It was admitted that the vicar had received all the small tithes that had ever been paid in the parish, and that tithes of the matters in question had never been rendered to any one. The defendants, the occupiers, by their answer, set up as a defence the 2 & 3 Will. 4. c. 100, that the land had been enjoyed without payment or render of the tithes in question, during the whole time that two persons in succession had held the benefice, and three years after the induction of a third person, or for the full period of sixty years. Four terriers were put in evidence.

Mr. Simpkinson and Mr. Purvis, for the plaintiff.—The receipt by the vicar of all the small tithes that were ever rendered in the parish, is good evidence that the endowment of the vicarage was of all the small tithes.

Cartwright v. Bailey, Gwill. 938.

Jeremy v. Strangeways, ibid. 1173.

NEW SERIES, XI.—CHANC.

Kennicott v. Watson, 2 Eag. & You. 690.

Byam v. Booth, 3 ibid. 716.

Willis v. Farrer, 2 You. & Jer. 217.

Garnons v. Barnard, 2 Eag. & You. 380.

Masters v. Fletcher, You. 25.

Manby v. Curtis, 3 Eag. & You. 733.

Jackson v. Woodroffe, ibid. 1302.

1 Eagle on Tithes, 122, 127.

The tithes are due to some one of common right. The rector having disclaimed, the vicar is entitled to an account.

Williams v. Jones, You. 252.

Leathes v. Newitt, 3 Eag. & You. 848.

The 2 & 3 Will. 4. c. 100. does not apply to a case like this. The exemption must still be pleaded; and if, upon the face of the pleadings, that exemption would not be valid before the passing of that act, it will not be now. The construction of the act is to be collected from the preamble, which shews that it was passed for the purpose of "shortening the time" required for establishing claims of *modus*, &c., and not for making an exemption good which was bad before.

Mr. Boteler and Mr. Eagle, for the defendants.—Jeremy v. Strangeways differs very much from the present case. In *Kennicott v. Watson* and *Masters v. Fletcher*, the old documents contained expressions, from which it might be inferred, that the vicar was entitled to all small tithes. In *Willis v. Farrer*, the vicar got no decree. Here, the terriers tend to negative the presumption of the vicar's right. *Clarke v. Stapler* (1) shews the ground of the decision in *Cartwright v. Bailey*. As to the disclaimer, the answer of one defendant cannot be read against another defendant. As to the act, the preamble is not to be read as limiting the meaning of the enacting clauses. If there is no objection to the exemption claimed, on the score of illegality or uncertainty, then the sixty-three years concludes the matter; and the defendants are not bound to shew that the lands were part of one of the larger monasteries, or to shew at all the legal origin of the exemption.

Mr. Simpkinson, in reply.

Feb. 8, 1842.—WIGRAM, V.C.—I postponed giving my judgment, partly on account of the importance and the very great difficulty

(1) Gwill. 926.

of the point, which arises upon the construction of Lord Tenterden's Act, and which has never yet been settled, and partly because it was said that a case was depending in the Court of Queen's Bench, the decision upon which would form a precedent in the case before me. But upon inquiry, I find that the case before me differs so much from the case before the Queen's Bench, that even if the Judges there should come to a different conclusion upon the construction of the act, I should still feel bound to give the judgment I am now about to pronounce.

The plaintiff in this cause is the vicar of the parish of Crosby-upon-Eden, in the county of Cumberland, of which parish the defendant, the Bishop of Carlisle, is rector. The defendants in the cause, except the Bishop of Carlisle, are occupiers of land within the parish; and the bill prays against the defendants, the occupiers, an account of the tithes of "turnips, potatoes, cabbages, tares, grass, clover, rye grass, sainfoin, and other artificial grasses not made into hay, but used as and for green fodder, or carried off the land in a green state, and other green crops yearly arising within the parish." The bill also prays an account of the tithes for agistment. That the plaintiff is the vicar of the parish, and that he has received tithes, other than those claimed by the bill, is not in dispute. That the Bishop of Carlisle is rector of the parish, is admitted; and for the purpose of raising the question of right, which is in issue in the cause, the defendants, who are occupiers of the land within the parish, have entered into admissions of the production upon and from off their respective lands, or the lands of some of them, of each of the titheable matters and things of which the tithes are claimed by the bill. It is also admitted, that cattle have been agisted by the defendants, or some of them. No special ground of legal exemption from payment of tithes in kind, is set up by the answer, but the defendants say, they believe that "the right and title to the tithes of all the several titheable matters and things is, and hath always been, vested in the rector for the time being of the parish, save and except so far as the same hath, as those defendants believe, been barred by a certain act of parliament, 2 & 3 Will. 4, an act for shortening the time required in claims of *modus decimandi*, or

exemption from or discharge of tithes;" and the answer then says, that the defendants "believe that the lands thereafter mentioned to have been in their respective occupations, have been respectively enjoyed, without payment or render of any tithes of the said titheable matters and things, or any of them, or money or other matter in lieu thereof, or any of them, to the vicar of the said parish, for and during the whole time that two persons in succession have held the said vicarage, and for not less than three years after the institution of a third person thereto, and during such number of years as are sufficient to make up the full period of sixty years, and also the further period of three years after the institution of a third person to the said vicarage." The answer, therefore, after suggesting that such tithes, if payable at all, are payable to the rector in point of fact, pleads Lord Tenterden's Act, in bar to the present demand. Several answers and further answers were filed, but to these it is unnecessary more particularly to advert.

In the course of the argument, a question was made, whether the bill was to be read as claiming the tithes in question in the cause, as parcel of an endowment of all the small tithes arising within the parish; or whether the bill was to be read, as claiming the tithes in question, without insisting upon the vicarage being endowed with all small tithes. But, upon reading the bill, I think the plaintiff is entitled to have the bill read, as founding his title to the tithes in question in the cause, as part of a general endowment of all the small tithes of the parish. The rector has disclaimed, and evidence, both oral and documentary, has been gone into.

In this state of circumstances, the first question which I have to determine is, whether the lands in the defendant's possession are exempt from the payment of tithes in kind, under the 2 & 3 Will. 4. c. 100, commonly called Lord Tenterden's Act. If this defence should succeed, no other question will arise; but if this defence should fail, then the further question will arise, whether the plaintiff has established a right and title to the particular tithes he claims by his bill. The history of the vicarage, so far as the successive incumbences are concerned, is as follows:—On the 16th of August 1730, Gibson became incumbent of the

vicarage on the death of the preceding incumbent. On the 25th of February 1758, Shaw succeeded Gibson. On the 18th of July 1791, Lowry succeeded Shaw. On the 28th of January 1833, Salkeld, the plaintiff, succeeded Lowry. On the 9th of November 1833, the bill is filed, being within three years after the commencement of the plaintiff's incumbency. In order to prove that none of the tithes claimed by the bill have been paid to the vicar, the defendant has examined witnesses on his part, and he also relied upon certain terriers which were put in evidence by the plaintiff, and to which I will presently refer. Without going through the evidence in detail, I may say it proves that the vicar of the parish, for the time being, has received, and I think I may add, is entitled to receive, the tithes of *certain* titheable matters and things arising within the parish,—“certain,” at all events, in this sense, that they do not include, but are different from the titheable matters and things of which the tithes are claimed in this suit. But tithes of some titheable matters have been paid in respect of all the land in the parish; and the claim in this cause is not that of a general exemption of the lands from all tithes, but a claim of exemption only in respect of particular titheable matters arising from lands confessedly liable to the payment of other titheable matters. If the plaintiff were permitted to garble the evidence adduced by himself, for the purpose of making his case appear in the most favourable light, he could not successfully contend that any of the evidence in the cause carries his case higher than this point at which I have placed it. In fact, however, two out of the four terriers which the plaintiff has put in evidence in the cause, viz. the terriers of 1777 and 1828, negative, or tend to negative his right to some of the tithes claimed by the bill. The evidence also proves with equal clearness the receipt by the rector for the time being, or by his lessee, of the tithes of corn and grain; and, as far as the evidence in the cause goes, the rector of the parish has never received or claimed tithes of any of the titheable matters and things claimed by the vicar in this suit. The tithes claimed in this suit have not, in fact, been paid to any one. Those tithes, however, must, upon the pleadings in this cause, be taken to have been at all times

due to some one, unless the statute which is relied upon has destroyed the right; and the conclusion therefore is, that the lawful owner of those tithes, whoever he may be, has merely neglected to enforce his rights. The questions then are, whether the tithes demanded in this cause, are now payable: and if payable, to whom they should be rendered. The defendants, against whom an account of tithes is prayed, are laymen; and their answer to the vicar's claim for tithes for the titheable matters in question, is founded merely upon the non-payment of those particular titheable matters during two successive incumbencies, (being together of not less than sixty years' duration,) and more than three years after the induction of a third incumbent. The claim of exemption is founded on non-payment of the tithes in question, and upon non-payment only. No attempt has been made to shew such a title to the lands which the defendants occupy, as, prior to the statute of 2 & 3 Will. 4. c. 100, might, in conjunction with non-payment of tithes in modern times, have established a case of legal exemption. The defendants insist, that, according to the true construction of that act, non-payment of tithes, during two such successive incumbencies as the act requires, and more than three years after the induction of a third incumbent, will of itself constitute a bar to the vicar's claim. The vicar, on the other hand, insists, that the statute, properly expounded, has not introduced any such rule of law as the defendants contend for; and the true construction of the act is the first question to which my attention must be directed. In order to a right solution of this question, it will be convenient to begin by advertng to the state of the law respecting legal exemptions of lands from the payment of tithes before and at the time when Lord Tenterden's Act was passed. Prior to that act, all lands in the hands of laymen were *prima facie* liable to the payment of tithes; and evidence shewing the enjoyment of lands, without payment or render of tithes for a period commencing before the time of legal memory, was no answer by a layman to the demands of a rector or vicar; a principle which was commonly expressed, by saying that a layman could not prescribe in *non decimando*. “There, non-payment of tithes,” says Mr. Toller, 2nd edit., page 163, “al-

though from time immemorial, does not amount to a discharge, without shewing some special ground of exemption; evidence of length of possession in such a case, a Court can pay no regard to, for the possession must have been unlawful, and therefore there must be a decree in favour of the common right." But, notwithstanding this general rule, there were certain cases in which a layman might effectually insist upon his lands being exempt from payment of tithes. The ground of such exemption, however, could only be found "in the title of the lands," in respect of which the exemption was claimed. The title which carried this privilege with it, was a title to lands proved to have been formerly parcel of the possessions of one of the greater monasteries at the time of their dissolution by King Henry the Eighth. In order, however, that such claim of exemption might be legally established, two things were requisite; first, that the lands should have belonged to one of the greater monasteries, and secondly, that the lands should have been holden by the monastery, discharged of the payment of tithes at the time of the dissolution. Proof of the former of the above requisites, namely, that the lands in respect of which the exemption was claimed had formerly belonged to one of the greater monasteries, carried with it a capacity in the lands for exemption from payment of tithes in kind, but did not necessarily prove it. Proof of the latter, namely, that the lands were holden by the monastery discharged of the payment of tithes at the time of the dissolution, was indispensably necessary to convert the mere capacity for exemption, which proof of the former fact established, into an actual right of exemption. In practice, the course which the trial took in cases in which exemption from the payment of tithes was claimed, was this: the party claiming the exemption began first, by deducing his title to the lands, in respect of which the exemption was claimed, under one of the greater monasteries; and secondly, having by this proof established a capacity for exemption in the lands, he proceeded to prove that they were held by the monastery discharged of tithes at the time of the dissolution. This latter proof was given in practice, by shewing a usage of *non decimando* in modern times; from which, when not opposed or

not effectually controverted by evidence of a contrary usage in earlier times, the Court was called upon to infer, that the lands had been held exempt from tithes at the time of the dissolution of the monastery to which they were proved to have belonged. But in such cases, the Court or a jury had often to determine between the weight of modern usage and evidence of older date, in deciding whether the evidence was sufficient to justify the presumption that the lands had been held by the monastery discharged of tithes at the time of the dissolution. The state of the law then before and at the time of the passing of Lord Tenterden's Act was this: that with respect to lands in the hands of a layman, not proved to have belonged to one of the greater monasteries, evidence shewing the enjoyment of the lands, without payment or render of tithes for any length of time, was immaterial; and evidence of the fact was neither required nor admissible in suits for the recovery of tithes; and with respect to lands proved to have belonged to one of the greater monasteries, and having on that account a capacity for exemption, proof of the enjoyment of lands, exempt from the payment or render of tithes in modern times, though carried back for centuries, might be countervailed by the production of a terrier, survey, valuation, or other evidence of more ancient date. No time of definite duration was fixed by law, which should carry with it a title to exemption, in spite of more ancient evidence to the contrary. In this state of the law, Lord Tenterden's Act was passed; the preamble of that act is as follows:—
 "Whereas the expense and inconvenience of suits instituted for the recovery of tithes, may and ought to be prevented, by shortening the time required for the valid establishment of claims of a *modus decimandi* or exemption from or a discharge of tithes, be it enacted"—then follow the enacting clauses; and by those clauses, it is enacted, that where a claim for the render of tithes in kind, shall be made by any lay person, a claim of exemption from or discharge of tithes, shall be sustained and deemed good and valid in law, upon evidence proving the enjoyment of the lands without payment, or render of tithes, money, or other matter in lieu thereof, for thirty years next before the time of demand; unless proof is given of the payment of tithes in kind, prior to the thirty years;

and if the proof of the enjoyment of the land without such payment or render as aforesaid, be carried back for sixty years, the exemption becomes absolute, notwithstanding the production of any earlier evidence; unless it is proved that the enjoyment was had by some covenant or agreement expressly. There are then other clauses applicable to the case of claims made by the clergy, which I need not here repeat, because in point of fact, they have this effect; that whereas, before the act, proof for any number of years back, that the lands had been enjoyed without payment of tithes, might always be countervailed by the production of earlier evidence,—by that act, if the proof was carried back for a certain number of years, that became conclusive, notwithstanding the production of any evidence whatever.

Now, upon this act, the vicar insists that it merely applies to cases in which before the act an exemption might lawfully have been pleaded. He insists, that the case of every occupier of land claiming exemption before the statute, consisted of two distinct parts; one relating to the title of his lands, the other to non-payment of tithes in respect of those lands; and that the statute applies to this latter point only, and leaves the occupier under the same obligations, as before the statute, to prove the former. The defendants, on the other hand, insist, that the act is general in its operation, and that a prescription *in non decimando*, may now be pleaded by any layman against a claimant of tithes, without reference to the title of the lands in respect of which the exemption is claimed. To this latter construction of the act, I cannot accede. What was the cause of the expense and inconvenience which, according to the preamble of the act, it was the object of the legislature to prevent? This is clearly answered by the language of the preamble itself. The cause was the length of time required for the valid establishment of claims of a *modus decimandi*, or exemption from or a discharge of tithes. What were the cases in which the expense and inconvenience were incurred? Not certainly in cases in which no legal exemption from payment of tithes might be made; for, except in those cases in which the title to the lands was deduced from one of the greater monasteries, the enjoyment of the lands without payment or render of tithes for any length of time

was wholly immaterial, and neither expense nor inconvenience were or could be incurred in such cases. The proposition suggested by the preamble of the act is, not that the expense and inconvenience is to be prevented, by making time material in cases in which before the passing of the act it was immaterial; but, that the time theretofore required by courts of law for the valid establishment of exemption from or discharge of tithes should be shortened. How can this language apply to cases in which proof for any length of time was not theretofore required, which the law itself, before the passing of the statute, excluded from the operation of that inconvenience and expense which the statute intended to prevent? If the preamble of the act is a legitimate test for determining what the cases were, to which the act was intended to apply, it is impossible to say that the act can have been intended to apply to cases, into which the time which the act proposes to shorten never entered; in which, for that reason, there was no time to shorten. It may be true, that the proof of a title to lands under one of the greater monasteries, may of itself be both expensive and inconvenient. But it is not that part of the occupiers' case, nor that expense and inconvenience, which the act proposes to deal with. It is with time, and time only, that the statute has to do. Bearing in mind then, that at the time of the passing of the act, two classes of cases existed, to one of which the preamble had no application, but to the other of which it had a direct application; in one class of which, the expense and inconvenience, pointed at by the act, did not and could not apply; in the other of which, that inconvenience and expense did occur; in one of which, there was no required time to shorten, in the other of which, a law limiting the time required for the valid establishment of claims of a *modus decimandi* was much called for; could that be a reasonable construction of an act of parliament, professing only to remedy an existing inconvenience in the mode of proving existing rights, which should make the act introduce an entirely new ground of exemption, and that, a prescription *in non decimando* theretofore repudiated by the law; and thus, by a side-wind sweep from the church a material part of its revenues, the claims to which never occasioned the mis-

chiefs which the act proposes to remove? I must here observe, that, in the construction I put upon the act, I do not in any way restrain the operation of its enacting clauses in their application to cases within the act. I use the preamble only for the purpose of ascertaining what the cases are to which the act was intended to apply. This is a strictly legitimate process for interpreting an act of parliament—*Emanuel v. Constable* (2), *Foster v. Bandury* (3). Indeed, courts of law have held, that the mere subject-matter of an act alone, without any preamble, may safely be relied upon for restraining the operation of general words—*In re Bruce* (4), *Arnold v. Arnold* (5). So with respect to the stock-jobbing acts: these in terms are general, and would apply to transactions in foreign stocks; a verbal construction which the Courts have rejected in favour of the obvious intention of the legislature to apply them only to British stocks—*Henderson v. Bise* (6), *Wells v. Porter* (7), *Morgan v. Pebrer* (8), *Elsworth v. Cole* (9). Other cases may be cited to the same purpose.

The considerations upon which the preceding observations are founded, have been derived entirely from the preamble of the act, and the nature of the subject about which the act is conversant. But the enacting clauses appear to me to lead irresistibly to the same conclusion. The act speaks of claims of modus and exemption. Can it have been intended that a modus, bad upon the face of it, as being desultory, uncertain, or otherwise invalid in law, before the act, should be made valid by the operation of the act? This question must be answered in the negative; for the act only professes to aid the proof of a modus, and not to make good a modus which before the act was invalid. It refers to the modus to be established as something known to the law. The act, in effect, describes the sort

of modus or exemption it means to aid. It is to be a modus or exemption by composition real or otherwise. The composition real is put as an example. The words "or otherwise," must mean other legal causes. The legislature could not have intended, under those general words, to create new causes for modus or exemption before unknown to the law. Nor is this the only argument to be derived from the enactments of the statute. The modus or exemption "by composition real or otherwise," of which the act speaks, is to be sustained and to be deemed good and valid in law, upon evidence of a certain kind described in the act. The modus or exemption then is a distinct thing from the evidence which is to sustain it. The act does not say that evidence of non-payment alone shall *create*, but only that it shall *sustain* the modus or exemption spoken of. The modus or exemption, therefore, whether by composition real or otherwise, must be pleaded, or there will be no issue, which the evidence is to sustain. The 7th section of the act, practically considered, supports this view of the case. I do not understand how a plea could be framed under the 7th section, which could avoid putting the exemption upon some known ground. Such are the considerations, which, upon a general view of Lord Tenterden's Act, would have led me to the conclusion, that that act should receive the limited construction for which the vicar contends. But when these considerations are applied to a case like that before me, they become irresistible. Tithes in kind, of all titheable matters produced from off the defendant's land, except the tithes in question, are admitted to be payable. If the lands are exempted from the titheable matters in question under Lord Tenterden's Act, it must be upon the ground of a supposed contract for such exemption, commencing before time of legal memory. But the titheable matters which are the subject of this supposed contract, or the greater part of them, were confessedly unknown in this country, until long after the time of legal memory. A modus, indeed, which is also founded upon a supposed contract before the time of legal memory, may well cover matters of new introduction, for the contract in that case may have been for the general exemption of the lands from payment of tithes of what-

(2) 3 Russ. 436; s. c. 5 Law J. Rep. Chanc. 191.

(3) 3 Sim. 40.

(4) 2 Cr. & Jer. 436; s. c. 1 Law J. Rep. (N.S.) Exch. 153.

(5) 2 Myl. & Cr. 256; s. c. 6 Law J. Rep. (N.S.) Chanc. 218.

(6) 3 Stark. N.P.C. 158.

(7) 2 Bing. N.C. 722; s. c. 5 Law J. Rep. (N.S.) C.P. 250.

(8) 3 Ibid. 457; s. c. 6 Law J. Rep. (N.S.) C.P. 75.

(9) 2 Mee. & Wels. 31; s. c. 6 Law J. Rep. (N.S.) Exch. 50.

ever nature, whether the titheable matters were known or unknown at the time of the supposed contract. But a contract before the time of legal memory, not to pay tithes of titheable matters then unknown, and thereafter to be introduced, would be merely void for want of consideration. Tithes of all titheable matters being originally due, a contract to take part only in satisfaction of the whole, cannot satisfy the right to the residue without an equivalent in value. It has, indeed, been suggested, that the statute makes no distinction between titheable matters of modern introduction into this country, and other titheable matters. This, I admit; but, in construing an act of parliament, the same rules of construction must be applied as in the construction of other writings, and if the subject-matter to which an act of parliament applies, be such as to make a given construction of its clauses impossible or irrational, I cannot for a moment doubt the right or the duty of a Court to have regard to such subject-matter, as necessarily bearing upon the legal construction of the act. This is invariably done in the construction of wills and deeds, and the principles which are correctly applicable to the construction of such instruments, are equally applicable to the construction of an act of parliament. The only way of escaping from this difficulty is, to suppose the act to apply only to cases in which a general exemption from all tithes in respect of particular lands is claimed, and not to a claim of exemption in respect of particular titheable matters only. That construction of the act will dispose of the present case; for in this case, the exemption claimed, is confined to particular titheable matters, arising from lands in respect of which no general exemption is claimed. But I see nothing in the words of the act to warrant such a construction as this; and if the words of the act are to be modified by reference to the subject about which it is conversant, I cannot but think this latter construction would be more violent than that which the vicar contends for. The vicar proposes only to confine the act to those cases to which the preamble says it was intended to be applied, and to leave the words of the act in full operation in all such cases.

The other construction would be merely arbitrary. It has been said, indeed,—and if the suggestion were well founded, it would

be of great force,—that if the construction of the act for which the vicar contends, were adopted, the act would have no operation, for that before the act, courts of law did not require proof of the non-render of tithes for so long a period as is required by the act, nor proof of so stringent a nature as that which the act requires. The first branch of this suggestion is clearly founded in mistake. The act has, in several most important particulars, introduced amendments into the law, though its construction be confined in the way contended for by the vicar; for whereas, before the act, proof of non-payment of tithes for thirty years, conferred no presumptive title to exemption, now, under the act, the common law right of a lay impropriator is taken away, and a *prima facie* title to exemption from tithes is established by such proof. Again, before the act, proof of non-payment of tithes for 100 years might be destroyed by the production of old surveys, valuations, or other documents. Now, under the act, proof of non-payment of tithes during a period defined by the act, confers in certain cases an absolute title to exemption from the payment of tithes. These examples of the effect of the act, under the limited construction contended for by the vicar, are ample for the present purpose; and if such be the effect of the act, it cannot be matter of surprise that direct and very stringent evidence should be required, where such new and important consequences are to follow. The act of parliament has, in effect, brought down the year 1 Rich. 1, to the commencement of a period of two incumbencies, (not being together less than sixty years,) and three years of a third incumbency, provided direct and stringent proof be given that, during this shorter period, no tithes in kind have been rendered. Seeing, then, that the preamble of this act is confined to a known and well defined class of cases, and finding that the act has ample matter to work upon, without extending it to cases not within the purview of the preamble, is it not more reasonable to ascribe to the legislature an intention only to introduce the important amendments in the law, which, according to the vicar's construction of Lord Tenterden's Act, will be introduced by it, than to ascribe to the legislature an intention (by an act, the preamble of which defines its limited object) to introduce by a side-wind a right

in laymen of prescribing *in non decimando* ? The reasoning I have applied to a general claim of exemption, will apply, *mutatis mutandis*, to a composition real.

Treating the case then as unaffected by Lord Tenterden's Act, the question remains, whether the plaintiff, upon the evidence now before me, has proved his right to the tithes claimed by his bill. In considering this question, I feel at liberty to use the disclaimer of the rector, as was done in *Leathes v. Newitt*, so far as to give the particular tithes claimed by this bill to the vicar ; for they are clearly due to some one ; and the rector, to whom the occupier says they belong, having disclaimed, he could not be permitted to claim them to the injury of the occupier—*Williams v. Jones*. But I cannot give effect to the disclaimer, as proving the plaintiff's "title" to the tithes ; for that would be to read one defendant's answer as evidence against a co-defendant. If the plaintiff had desired the benefit of the rector's disclaimer, he might have dismissed the bill as against him, and have examined him as a witness ; and it would then have appeared whether the disclaimer proceeded upon a want of original title in the rector, or whether the rector had fallen into the same mistake as the vicar, in supposing that Lord Tenterden's Act was a bar to his claim. Upon principle, I must try the question of right, just as if the rector had not been a party to the record. Two of the terriers go a great way to throw doubt upon the vicar's right. The cases cited, were *Cartwright v. Bailey*, *Jeremy v. Strangeways*, *Kennicott v. Watson*, and *Byam v. Booth*.

Now, in the first two of those cases, the vicar proved the receipt of all the tithes that had ever been paid in the parish ; but with regard to some particular titheable matter, it appeared the rector had received it ; but the vicar having proved his title to all the tithes ever paid in the parish, and the particular tithe being, in one of the cases, a tithe of new introduction, and in the other, it appearing that there had been a mistake in courts of law respecting the right of the rector or vicar to tithes, the Court held, that the receipt by the vicar of all titheable matters that ever had been paid, coupled with the explanation that was given of those particular titheable matters, left the vicar entitled to all his tithes. With regard to the other case, I have examined the case

and the judgment with great attention, and I certainly am strongly impressed with the belief that Mr. Boteler's criticism is quite correct on that—that in all those cases the Court proceeds on the principle, that in some of the documents it finds an acknowledgment of the vicar's right to all small tithes, to found some such title. None of those cases, therefore, are any authority for the proposition, that where a vicar has received only some tithes, and where a great number of other different kinds of tithes are claimed, and nobody has received them, and where the terriers rather tend to contradict the vicar's title to some of them, there is sufficient evidence to prove the vicar's title. The case of *Willis v. Farrer* was also cited. Now, that case so far from being a judgment in favour of the vicar, was a case in which the Chief Baron directed an issue to try the right. There are some dicta to be found in that case, which would favour the vicar's right, but when the case is examined, and the conclusion which was come to, the case itself is a complete answer to the dicta, so far as they go to shew the vicar can be held entitled to all the small tithes, merely because he has received some ; when a great number were not received, and when there is evidence contradicting his right to some. The case of *Masters v. Fletcher*, which was also cited, seems to me to stand on the same footing as the last, being no authority ; and the only other cases cited, were *Jackson v. Woodroffe* and *Manby v. Curtis*, which do not at all apply to the case before me. Whatever opinion, therefore, I may privately entertain with respect to the vicar's right in this case, I think I should be going further than any Court has hitherto gone, if in the face of the terriers and the other circumstances of this case, I were to hold the vicar's title established on the evidence now before me, unless I am to give effect to the rector's disclaimer, in aid of the plaintiff's title against the occupier ; and this I cannot do, without violating a very important rule of practice. The plaintiff, therefore, may, in this case, on the authority of the case in *Gwillim*, to which I have referred, take a decree for the particular tithes, without costs, unless, for the purpose of establishing his right, he thinks fit to take an issue.

WIGRAM, V.C.
1841.
Dec. 7, 8, 10, 11. } WALKER v. JEFFERTS.
1842.
Jan. 11, 24. }

Specific Performance—Lease of Mines—Covenant for Renewal—Laches—Covenant for working—General Relief—Execution of Trust—Consideration.

By release of the 6th of October 1791, reciting that B, X, and Y, (X. & Y. not being parties to the deed,) had proposed as co-partners to accept a lease of the premises, for the purpose of getting the minerals thereunder, and making iron thereon; A, a mortgagee, and B, the owner of the equity of redemption, conveyed the premises with the mines, &c. to C, upon trust, to demise the same to B, X, and Y, for forty-two years, and upon further trust, at the request of the lessees, to execute a further lease for twenty-one years, and upon the execution of the lease to reconvey to A. and B. By a deed of the 7th of October, C. demised the premises to B, X, and Y, for forty-two years, reserving as the surface rent, 100*l.*, and certain royalties in respect of the minerals; and C. covenanted with the lessees to execute a further lease for twenty-one years; and the lessees covenanted, among other things, "that the mines should be fairly got and regularly worked to as little disadvantage as possible to C, his executors, &c." By a deed of the 8th of October, C. reconveyed to A. the premises and the accruing rents, subject to the lease, and reserving to C. a power to grant the further lease. In 1796, B. conveyed his reversion in fee in the mines to M. and T, as tenants in common. The mines were worked and royalties paid till 1815, at which time it was admitted the mines were "drowned out." The surface was occupied by the plaintiffs with iron-works, and the rent of 100*l.* regularly paid to the parties entitled, up to the present time. On the 24th of June 1833, the lessees applied to M. and T. to concur in the grant of the further lease; and on the 3rd of July, M. and T. declined to comply, denying the right of the lessees. On the 27th of June 1836, the assignees of the lease filed their bill, stating the trust in C, and the covenant to renew, and praying a specific performance of the covenant as to the mines:—

Held, that the laches of the plaintiffs in
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filing their bill, would, if the case depended on the covenant alone, have been a bar to the relief.

That the prayer of the bill being confined to specific performance of the covenant, would not preclude the Court, under the general prayer, from entertaining the question of the trust, as it was no surprise on the defendants.

That under the covenant, "that the mines should be fairly got and regularly worked," &c., the lessees were bound to continue the working, if practicable; and that an issue must be directed, as to whether the "drowning out" of the mines, or their continuance in that state, was by any default of the plaintiffs. Semble—If it were not, the Court would not refuse specific performance.

Semble—That C. was, under the deed of the 6th of October 1791, a trustee for the lessees as well as for the grantors; but that the Court was not bound to execute such trust irrespective of the conduct of the lessees; and if they had "materially" failed in their duty at the time when they asked the assistance of the Court, it was a failure of the consideration for which the trust was created, and the lessees would be left to their legal remedies.

The plaintiffs declining to try the issue,—Held, that the onus of proving no default, was upon them, and the bill was thereupon dismissed with costs.

By indentures of lease and release of the 5th and 6th of October 1791, between A. Cocker of the first part, John Read of the second part, J. Carpenter of the third part, J. Wilkes, a trustee of two several terms of 500 years, of the fourth part, and W. Chrees, a trustee of a term of 1,000 years, of the fifth part, reciting that John Read was owner in fee of a messuage and forty-seven acres of land, and also of two closes called "The Lower Grounds," containing about six acres, subject as to the first-mentioned premises, to a mortgage in fee to Cocker, for securing 2,000*l.*; and reciting that W. Banckes, John Read, and J. Dumaresq had proposed, as co-partners, to accept a lease of the said premises, for the purpose of getting the coal, ironstone, and other minerals in and under the same, and for making iron thereon; and reciting that John Read had applied to and prevailed upon A. Cocker to join him in conveying the premises to Carpenter and

his heirs, upon the trusts therein mentioned; it was witnessed, that for the considerations therein mentioned, Cocker and John Read conveyed the first-mentioned premises, together with all mines and minerals, &c. to J. Carpenter, his heirs and assigns, in trust, that J. Carpenter should forthwith demise the same to W. Banckes, J. Read, and J. Dumaresq, their executors, &c., for the term of forty-two years, subject to such provisos as should be necessary to enable them (the lessees) to work and get the said mines and minerals, and under proper covenants on the part of the lessees, for the payment of the surface and mineral rents intended to be reserved; and, upon further trust, that Carpenter, his heirs and assigns, should at any time thereafter, at the request and costs of the lessees, their executors, administrators, and assigns, grant and execute a further lease of the said premises, for the further term of twenty-one years, to commence from the expiration of the said term of forty-two years, in the said first-mentioned lease, and to be subject to the same yearly rents and covenants, (except a covenant for such renewal,) and immediately after the execution of the said lease, upon trust, that Carpenter and his heirs should reconvey the said premises to Cocker and his heirs, for securing the said sum of 2,000*l.*, but, subject to the said lease, and subject to a power of redemption for Carpenter and his heirs, in trust for J. Read, his heirs and assigns; and by the same indentures, J. Read conveyed the two closes to Carpenter and his heirs upon the like trusts; and Wilkes and Chrees covenanted to stand possessed of the residue of the several terms, in trust for Carpenter, his heirs and assigns.

By a deed of the 7th of October 1791, between J. Carpenter of the first part, Cocker of the second part, Wilkes of the third part, Chrees of the fourth part, Banckes, J. Read, and Dumaresq of the fifth part; Carpenter and the parties of the second and third parts demised to Banckes, J. Read, and Dumaresq, their executors and administrators, the messuage and appurtenances, and the forty-seven acres, and also the two closes, and also all the mines and veins of coal being in and under the same for the term of forty-two years, from the 29th of September then last past, yielding and paying during the said term, to Carpenter, his heirs and assigns,

the yearly rent of 100*l.*, as and for the surface rent of the messuages and closes, pieces or parcels of land, by equal half-yearly payments; and also yielding and paying every year during the said term, in respect of the mines and minerals, to Carpenter, his heirs and assigns, the sum of 9*d.* per ton, &c., (being certain royalty rents on the minerals raised). And Carpenter did thereby covenant with the parties of the fifth part, that he, Carpenter, his heirs and assigns, would at any time thereafter, at their request and costs, execute a lease of the said mines and premises, for the further term of twenty-one years, to commence from the expiration of the term of forty-two years, and to be subject to the same yearly surface and other rents, and to the same covenants, except the covenant for renewal. And the lessees therein covenanted, that they, their executors, administrators, and assigns, should and would so work the said mines, as that there should be no more thereof wasted or left for the support of the roof, than should be absolutely necessary for the safety of the works, and that all the mines should be fairly got, and regularly worked, to as little disadvantage as possible to the said J. Carpenter, his executors, administrators, and assigns. The lease contained no provision as to a sleeping rent.

By a deed of release of the 8th of October 1791, after reciting the lease granted to the partnership, Carpenter, in execution of the trust of the release of the 6th of October 1791, reconveyed to Cocker, his heirs and assigns, the messuage and forty-seven acres, together with the surface rent of 100*l.*, and all the rents and royalties to grow due in respect of the mines, subject to, and reserving a power to Carpenter and his heirs, to grant a further lease of the said mines and premises for the term of twenty-one years, and subject to redemption on payment of the 2,000*l.* and interest. And by the same deed, Carpenter reconveyed to J. Read, his heirs and assigns, all the two closes, &c. And Wilkes and Chrees covenanted to hold the several terms, in trust for Cocker, his heirs and assigns.

After several mesne assignments, the whole interest in the lease, by a deed of the 16th of July 1808, became vested in Baker and Crane, as trustees for certain creditors.

In August 1811, John Read became

bankrupt; and by a deed of the 29th of March 1822, his assignees and the trustees of the deed of July 1803, assigned all his interest in the lease to Samuel Walker.

In August 1834, Samuel Walker became bankrupt, and W. Ellis was appointed his assignee. On the 15th of December 1834, W. Ellis, as such assignee, entered into articles of agreement, to sell all the interest in the lease to the plaintiffs, and on the 12th of January 1836, a formal assignment was executed.

By deeds of lease and release of the 13th and 14th of April 1796, John Read, in consideration of 9,000*l.* conveyed to Matthew and Thomas Jefferys, as tenants in common in fee, all those, the mines and minerals, &c., under the lands comprised in the lease of the 7th of October 1791, (excepting the pipe, pot, and fire clay,) subject, however, to that lease and to the covenant for renewal therein contained; and J. Read thereby covenanted to pay off Cocker's mortgage, and to procure the legal estate in the mines to be conveyed to Matthew and Thomas Jefferys. Matthew Jefferys died in 1813, having by his will devised all his interest in the premises to his son John Jefferys. On the 8th of July 1835, John Jefferys died, and by his will, his moiety of the premises became vested in G. Talbot, William Lea, and John Lea, in trust for sale; and the devisees in trust, and the *cestuis que trust* were made defendants to the suit.

Thomas Jefferys (the other tenant in common) died in 1818, having by his will, (making no specific devise of the mines,) given all his residuary real and personal estate to the defendant Mrs. Cox, who was also his heiress-at-law.

In April 1796, W. Savage and J. Adams (trustees) paid off Cocker's mortgage, and the mortgaged premises were transferred to them, as a security for the 2,000*l.* and interest from that date. James Adams died on the 16th of October 1813, leaving W. Savage, his co-trustee, him surviving.

The bill then stated, that the legal estate in the mines (except the pipe, pot, and fire clay) was now vested in W. Savage (defendant), or else as to one moiety thereof in Ann Chaplin (defendant), in trust, as to one moiety, for the parties entitled under John Jefferys's will, and as to the other moiety in trust for Mrs. Cox.

J. Carpenter died in March 1819, leaving the defendant, George Carpenter, his heir-at-law. The bill further stated, that the owners in fee of the surface of the premises, comprised in the lease of the 7th of October 1791, were always ready to grant a further lease of the premises, pursuant to the covenant therein contained. The bill then charged, that the defendants, the owners of the reversion in the mines, were bound to grant such renewed lease, in pursuance of the covenant, and also of the trusts contained in the release of the 6th of October 1791. The owners of the reversion in the surface of the premises, were not made parties to the suit.

The bill, which was filed by the plaintiffs, as purchasers of all the interest in the lease from the assignees of J. Walker, prayed that the covenant for renewal might be specifically performed, and that the defendants might be decreed to execute to the plaintiffs a new lease for twenty-one years, to commence from the expiration of the original term of forty-two years; and that the said defendants might be restrained from bringing any action of ejectment, or demising the premises to any other person.

A supplemental bill was filed, stating, that since the filing of this bill, a decree had been made at the Rolls, appointing John and Matthew Jefferys and C. Davey, trustees, in the place of the trustees named in the will of J. Jefferys, deceased, who had declined to act; and that all the real and personal estate of the testator had been conveyed to them; and praying the same relief against the new trustees.

The term of forty-two years expired at Michaelmas 1833.

The defence set up by the answers, was to the effect, that shortly after the bankruptcy of John Read, the mines had ceased to be worked, and were, in fact, "drowned out," and that no royalty had been paid to the owners of the reversion for twenty years past; and that it was the intention of the plaintiffs, if they obtained a new lease, not to work the mines, but to keep others from working them, as they, the plaintiffs, had mines of their own in the immediate neighbourhood. And the defendants submitted, that it was not an equitable use of the said lease, to keep the mines unproductive to the owners for twenty years, and that the Court.

after such an abuse, would not decree specific performance of the covenant to renew. That on the 24th of June 1833, application was made by S. Walker to the defendants, for a renewed lease, when by a letter of the 28th of June, Bailey, as solicitor of the defendants, declined to grant such renewed lease.

The answers also set up the case, that in consequence of the severance of the interest in the reversion of the surface and of the mines, the covenant for renewal could not be enforced as to the mines only.

Mr. Wakefield, Mr. Faber, and Mr. Craig, for the plaintiffs.—The right of the plaintiffs to a renewal, rests upon two grounds. First, upon the trust reposed in Carpenter by the deed of the 6th of October 1791, to grant a further lease of twenty-one years; and secondly, upon the covenant to renew in the lease of the 7th of October 1791. It is asked, that the trustee may execute that trust.

[WIGRAM, V.C.—The question is, whether you are *cestuis que trust* under the deed of the 6th of October. Suppose the parties to it had burnt it the next day, could the lessees have set it up again?]

It was a trust for their benefit. And this question is quite independent of the covenant. Next, as to the covenant in the lease. The specific performance cannot be resisted, on the ground of forfeiture for not working, for the covenant is only to work properly, and not to raise any given quantity, or for continuity of working. There is no sleeping rent reserved. But in 1815, the mines were drowned out, by no default of the lessees. The severance of the surface and the mines by the lessor, cannot affect the rights of the lessee. Even if there had been a forfeiture, the acceptance of the surface rent by the parties entitled, has waived it. But there has been no forfeiture giving a right of re-entry—*Hill v. Barclay* (1).

Mr. S. Sharpe and Mr. Follett, for the parties entitled under John Jefferys's will. Carpenter was a trustee for the owner of the inheritance, and not for the lessees; and so the bill puts it, for it prays merely a specific performance of the covenant. After that deed was executed, would the lessees have been bound to accept a lease of the premises?

The arrangement was necessary, in order that the lessees might have a legal interest. In the reconveyance by Carpenter, he reserves to himself a power, and not a trust. But if it were a trust, it cannot be contended that the lessees, after breaking every covenant in the lease, could come for the execution of that trust. Whether it stands upon the trust or the covenant, it comes to the same question; namely, the conduct of the parties. The defence rests upon this ground; it is evident, the intention of the mortgagee and owner, in granting the lease of October 1791, was to have a beneficial enjoyment of the mines; if that intention is frustrated by the conduct of the lessees, the Court will not lend them its assistance to obtain a renewed lease, but will leave them to their remedies at law. That is the principle laid down in—

The Duke of Bedford v. the Trustees of the British Museum, 2 Myl. & K. 552; s. c. 2 Law J. Rep. (N.S.) Chanc. 129.

Roper v. Williams, Turn. & Russ. 18.

Otherwise, the Court would be assisting the plaintiffs in preventing the mines being worked. But the delay of the plaintiffs is fatal to the relief asked. The lease expired in Michaelmas 1833; in June 1833, application was made for a new lease, and positively refused by the defendants, and the bill was not filed till January 1836.

Heapy v. Hill, 2 Sim. & Stu. 29.

Watson v. Reid, 1 Russ. & Myl. 236.

Mr. Swanston and Mr. J. Bacon, for Mrs. Cox.

Mr. Wakefield, in reply.—By the language of the deed of October 6, they have made this a trust, and they cannot now avow a different intention—*Lord Irnham v. Child* (2).

[WIGRAM, V.C.—The question then would be, whether you had paid the whole consideration.]

From 1815 to 1833, the lessors never complained that no coal was raised. A breach of the covenants is said to have been committed for eighteen years, and the lessors have never attempted to enforce their rights. The object of the lessees was not merely to work the mines, but to have ironworks on

(1) 18 Ves. 56.

(2) 1 Bro. C.C. 92.

the surface. They have not broken the covenants in the lease, and there is no case of a lease being determined upon equitable circumstances. The cases cited as to delay, do not apply; for the lessees were in possession after the determination of the lease, asserting their right; and, in that state of things, there could be no laches in not filing a bill.

Jan. 11, 1842.—WIGRAM, V.C.—In this case, I have come to the conclusion, that I cannot finally dispose of it, without an inquiry on certain points. But before I state the reasons of my judgment, I must mention, that the record is in that state, that I can make no decree, unless the plaintiffs are disposed to concede some points which must be inserted in the decree. The bill is filed by the assignees of a lease granted in October 1791, for a term of forty-two years, with a covenant to renew for twenty-one years more, to obtain the benefit of that covenant. Now, that lease comprised the surface of certain lands, and the mines under them. The owners of the surface are not parties to the suit; but it was consented to by all parties, that it should be treated as a suit seeking only a lease of the mines; and with respect to the mines, it is necessary that all persons beneficially interested therein should be parties. Now, it appears, that in 1794, J. Read, who seems from his acts to have been the owner of the reversion in the premises, conveyed the reversion in the mines, expectant on the lease, to Matthew and Thomas Jefferys, as tenants in common in fee, excepting thereout to himself and his heirs, "the pipe, pot, and fire clay." Now, it is not shewn what has become of that interest: for anything that appears to the contrary, it is at this time vested in the assignees of John Read; for all that they conveyed to S. Walker were the leasehold interests, which at that time were vested in John Read. If, then, I am to proceed in the case, without the assignees being parties, it must be on the terms of the plaintiffs waiving all right to relief, in respect of the pipe, pot, and fire clay.

A further difficulty occurs with respect to the reversion in the mines. The title of Mrs. Coxe to one moiety appears to be regularly deduced. As to the others, it appears to be vested in the devisees in trust under the will of John Jefferys, after pay-

ment of debts, for the benefit of his children; and it does not appear on the record who the children of John were. But on looking through the case, it appeared to me, that as the trustees were here, I might, by saving the rights of those parties, make a decree with perfect safety; if the plaintiffs will consent that in any lease to be granted, there shall be a recital of so much of the will of John Jefferys, as will shew what the interest of those parties was; for by decreeing a lease to be granted by the heir of Carpenter *simpliciter*, a legal interest would pass to the lessees, and the property might afterwards pass into the hands of a purchaser for value without notice, and thereby persons having beneficial interests might suffer by it. But I take it for granted, that the plaintiffs will not object to that being done.

I will now state the conclusions I have come to on the case. It appears, that before executing the indentures of the 5th and 6th October 1791, J. Read and Banckes and Dumaresq, carried on business, in partnership as coal and iron-masters, and were desirous of accepting a lease of the premises in question, for the purpose of getting the coal, ironstone, &c. under the same, and making iron thereon. In order to give effect to this desire, application was made to Cocker to concur in granting such lease, and the arrangement was effected by the deeds of the 5th and 6th of October 1791—(vide *supra*). By the release, it will be observed, the property comprised in Cocker's mortgage, and "the lower grounds," not therein comprised, were conveyed to Carpenter. By a deed of lease of the 7th of October 1791, the property is demised by Carpenter to the partnership, rents are reserved, a surface rent of 100*l.*, and no more, being the exact amount of the interest on Cocker's mortgage; royalties are reserved, and there is a proviso for re-entry, in the case of non-payment of rent. Then follows a covenant by the lessees, for payment of the rent, and also "that the lessees shall and will so work the mines, &c."—(vide *supra*). Then in a subsequent part there is a covenant for renewal. By lease and release of the 7th and 8th of October 1791, made between, &c., (vide *supra*), reciting the different transactions, the property comprised in the mortgage was reconveyed to Cocker, in fee, subject to the lease made, and subject to a

power in Carpenter to grant a lease for twenty-one years, and the rest of the property to J. Read, in fee, subject in the like manner. Subsequently, the whole interest in the lease became vested in J. Read. In August 1811, J. Read became bankrupt, and the interest in the lease then vested in his assignees. From 1791 till his bankruptcy, J. Read worked the mines, and paid royalties to Thomas and Matthew Jefferys; and from his bankruptcy to 1815, his assignees worked the mines, and paid royalties to Thomas and Matthew Jefferys. In 1815, the mines were, in the language of the admissions, "drowned out," and the same have never been since worked, or any rent or royalties paid in respect of the same. In 1817, S. Walker purchased the interest in the lease, which was assigned to him in March 1822. On the 24th of June 1833, being little more than three months from the expiration of the lease, the solicitors of S. Walker wrote a letter to the solicitor of the then proprietors of the mines, demanding, in effect, a further lease of twenty-one years, according to the terms of the contract contained in the deed of the 6th of October 1791, and in pursuance of the covenant in the lease of the 7th of October following. It appears, therefore, that at that time the solicitors of the plaintiffs referred their right to the renewed lease, as in the argument in this case, both to the covenant in the lease, and to the trust vested in Carpenter to grant a new lease. It appears that that letter was accompanied by a draft of the proposed lease. On the 28th of June following, the draft was returned with the following letter from the defendants' solicitor:—"I was much surprised to receive the draft lease, which you sent me for my perusal on the 25th inst., having before expressed to you that Mr. Jefferys and Mrs. Coxé do not consider that Mr. Walker is entitled to demand it. I therefore beg to return you the draft." On the 1st of July, Mr. Walker's solicitors again wrote to the defendants' solicitor a letter, in which they did not dispute his statement, that he had before expressed to them that his clients did not consider Mr. Walker entitled to demand the lease, but expressing a wish to be informed whether they may consider his letter as a refusal on the part of his clients to grant the lease. This is answered by a letter of the 3rd of

July, in which the defendants' solicitor says, that "they may consider his former letter as the refusal of his clients to grant the lease, as they decidedly decline doing so." In August 1834, S. Walker became bankrupt, and W. Ellis was appointed sole assignee. In the same year, W. Ellis agreed to sell to Messrs. Walker, the interest of Samuel Walker in the lease; and by a deed of the 12th of January 1836, the lease was formally assigned to them. The plaintiffs entered upon the premises, and have ever since been in possession. The defendants are said to be the persons in whom the legal and beneficial interest in the mines now are vested; and subject to the inquiry which I propose to direct, I shall assume the defendants to sustain that character. The bill was filed on the 27th of January 1836, being two years and seven months after the decisive refusal of Mr. Bailey on the part of his client, to grant a new lease for twenty-one years, and two years and three months after the original lease expired. The bill prays a specific performance of the covenant.

The plaintiffs rest their title to relief on two distinct grounds; first, on the covenant to renew in the original lease of 1791; and secondly, if for any reason the Court should refuse to enforce the performance of that covenant, supposing the plaintiffs' title to relief to have depended on that covenant alone, the plaintiffs insist that they have an equitable right to the relief prayed by the bill, on the ground of a trust completely declared in their favour by the deed of the 6th of October 1791. In the argument for the defendants, it was insisted, that the prayer of the bill being confined in terms to a specific performance of the covenant for renewal in the lease of October 1791, the Court could not found a decree on the alleged trust in the release of the 6th of October 1791. To this argument, I cannot accede; the whole question, so far as the alleged trust is concerned, arises upon the construction of the instruments executed in October 1791, which are common to both parties; and I should be greatly restricting the usual practice of the Court in such cases, if I were to refuse the plaintiffs, under the prayer for general relief, any equity to which they are entitled under the deed of the 6th of October 1791. No surprise on the defendants can be alleged by my doing so; and that is a

wholesome test, though not always a conclusive one, by which the sufficiency of the prayer for general relief is to be tried. I shall therefore entertain both the questions insisted on by the plaintiffs.

The objection taken by the defendants to the plaintiffs' case, so far as it depends on the covenant for renewal, are two; first, it is said, that the acquiescence of the plaintiffs, from the 3rd of July 1833, till the filing of the bill in July 1836, after the refusal of the defendants to grant the lease, is decisive against the plaintiffs' claim; and *Heapy v. Hill* and *Watson v. Reid* were cited. Secondly, the defendants aver, that those under whom the plaintiffs claim had forfeited their right to a renewal of the lease in equity, by a breach of the covenant, in not having so worked the mines, that there should be no more thereby wasted or left for the support of the roof than should be necessary for the safety of the works; and by a further breach of covenant in having wrongfully discontinued working the mines since the year 1815, whereby the same have been and now are wholly unproductive to the lessor. I will consider these two objections separately; and first, with respect to the acquiescence of the plaintiffs in the notice given by the defendants in July 1833. To this objection, if it stood alone, I should be strongly disposed to give every effect which the rules of the Court permitted me to do. In contracts relating to land, time is not generally considered as of the essence of the contract in courts of equity. At one time it was considered that time could not be made of the essence of the contract, even by express stipulation; it was afterwards decided, that it might by express stipulation; and from that time the tendency of the decisions of this Court, especially those of Sir J. Leach, has been to hold persons, concerned in contracts relating to land, bound, as in other contracts, to regard time as material—*Reynolds v. Nelson* (5), *Heapy v. Hill*, *Watson v. Reid*, *Stuart v. Smith* (6), *Cooper v. Emery* (7), (both those cases are prepared for reporting by Mr. Russell, by whom I was furnished with a note of them)—*Ripley v. Woods* (8) and *Lloyd v.*

Collett (9). And this principle has been applied with a greater strictness where, from the circumstance that the property was connected with trade, time was obviously material, as in *Hughes v. Wynne* (10) and *Coslake v. Till* (11). Those cases appear to me so sound in principle, that I certainly will not be the first to shake them. *Heapy v. Hill* and *Watson v. Reid* are indeed authorities, that if one of two parties, concerned in a contract respecting lands, gives the other notice that he does not hold himself bound to perform, and will not perform, the contract between them, and the other contracting party, to whom the notice is given, makes no immediate assertion of his right to enforce the contract, equity will consider his conduct as an acquiescence in the notice, and an abandonment of any equitable right he may have had subsequently to enforce the contract, and will leave the parties to their legal remedies or liabilities. In this case the plaintiffs, or those under whom they claim, might have claimed a renewal of the lease at any time after the 7th of October 1791; they work the mines from that time to 1815, from which time the working of the mines was discontinued; I say, the working was discontinued, because I agree with Mr. Wakefield, that the surface and the mines having been the subject of one demise, and having both been enjoyed together till 1815, the continued possession of the plaintiffs, or those under whom they claim, of the surface, is in law a continued possession of the mines also, in the absence of any adverse possession of the mines by any other party. However, from 1815, the working of the mines has, in fact, been discontinued. In July 1833, the plaintiffs have the most positive and distinct notice, that the owners of the mines deny their right to a renewed lease, and from that time no assertion of right, or intention to assert the right, has been made or declared. I am not persuaded that either of the grounds put forward by the plaintiffs for taking this case out of the operation of the rule in *Heapy v. Hill* and *Watson v. Reid*, are sufficient. The constructive possession of the mines, without ever actually entering them, which, since the termination of the

(5) 5 Mad. 60.

(6) 16th December 1834.

(7) Rolls, 17th July 1839.

(8) 2 Sim. 165.

(9) 4 Bro. C.C. 469.

(10) Turn. & Russ. 307.

(11) 1 Russ. 376.

forty-two years' lease, the plaintiffs have had, by the occupation of the surface, has in no respect altered the position of either party. The determination of the defendants not to renew the lease, has remained unrevoked, and the plaintiffs have known throughout that such was the case. The payment, in the meantime, of the surface rent to the owners of the surface, ought not, in my judgment, to affect the rights of the owners of the mines. The ownership of the right and property in the mines was severed from the interest in the surface in 1796, and the mines and the surface have been held as separate inheritances since that time. That was the act of J. Read, under whom all parties in the cause claim, and has been acknowledged and acted upon ever since it was made by the parties, from time to time holding the lease of October 1791. Indeed, the frame of this suit, to which the owners of the surface are not parties, would alone dispose of this objection. Finding, however, that the declaration of my opinion on this point will not necessarily decide the whole case, on account of the question of trust, which has been raised, I shall abstain from expressing my opinion on that point more distinctly than I have done. I proceed, therefore, to inquire into the validity of the defendants' second objection, which is founded on alleged breaches of covenant by the lessees, from time to time holding the mines under the lease of October 1791. In reply to this objection, the plaintiffs have made four points: first, that there was no evidence that more of the mineral had been wasted or left to the support of the roof than was absolutely necessary for the safety of the works; and that, according to the true construction of the covenant for working the mines, the lessees were not bound to work the mines, except at their will and pleasure: secondly, the discontinuance, by the lessees, of working the mines, had not been an improper act, for that the working of the mines had been rendered impracticable by their being drowned out, and such drowning is a calamity to which all mining property is liable; and the lessees could not, by working the mines, according to any construction of the covenants in the lease, have prevented the mines from being drowned, or relieved them from the water since they were drowned;

and if this can be made out in fact, the plaintiffs contend, that a court of equity will not deprive them of a renewed lease by reason of accidents not under their controul, but which, from the nature of mining property, must be considered within the contemplation of the parties at the time the lease is granted: thirdly, it was argued, that a court of equity will not refuse to perform an agreement to grant a lease, by reason of such acts or omissions on the part of a lessee as, if a lease had been granted, would have constituted a breach of covenant, unless that breach would have entitled the lessor to enter and avoid the lease, as in *Hill v. Barclay*: fourthly, it was said, the lessor had never complained of the alleged breaches of covenant, and must, as against purchasers since 1815, be taken to have waived them. The first of these points, so far as it relates to the manner of working the mines (and also the fourth point if it is desired), must be the subject of inquiry, though neither party will probably think the result of such inquiry of importance equivalent to the expense likely to attend it; that is, I mean, as to the not leaving enough to support the roof. With respect to so much of the first point as relates to the construction of the covenant for working the mines, I cannot bring my mind to accede to the plaintiffs' view. The clearest language will be necessary to satisfy me that Cocker, the mortgagee, whose trustee Carpenter was intended to be, had agreed to accept a lease, to convert his interest in the mines into a lease, reserving a rent only just equal to the interest on his mortgage debt, at the option of the lessee, and to have agreed to have converted this into a dry reversion expectant on two leases of sixty-three years' duration. I do not find anything in the language of the covenant to force me to that; it is an improbable construction. The covenant with Carpenter is, in equity, a covenant with Cocker. The covenant is, that "all the mines shall be fairly got and regularly worked out." Stopping there, the covenant is imperative. Then do the subsequent words, which impose on the lessees the obligation to work the mines at as little disadvantage as possible to Carpenter, his heirs, &c., so affect the construction of the previous words as to absolve the lessees from all obligation to work the mines at all? That

would, in my opinion, be an unreasonable construction of the covenant. The covenant, I think, was intended to oblige the lessees to work the mines, and something more. This construction is in principle the same as that which Lord Cottenham adopted, after much consideration, in the case of a will—*Mirehouse v. Scaife* (12). That was the case of a person directing all his debts to be paid within six months; and Sir J. Leach, in one case, had held, that, although a direction that all debts should be paid will charge the real estate, if the direction is, that they shall all be paid within six months, that merely referred to the payment in the ordinary mode, and will not affect the real estate. Lord Cottenham held, that a direction to pay the debts cannot be discharged by a direction to pay them in a short time; and he held, therefore, in a case of that sort, that the effect of the words would be to charge the real estate; and I confess I cannot see, that if a man covenants he will work the mines, he can be said to be discharged from the obligation to work them, because he covenants he will work them in a workmanlike manner. The circumstance, that the lessee was also lessor of the mines, does not appear to me to throw any doubt on the meaning of the covenant; it was the mortgagee for whose benefit this rent was principally reserved. On the second point made by the plaintiffs, I am not, so far as the facts of the case are concerned, in a condition to form any opinion. The admission is, that the mines are in fact drowned out, but whether that state of things is to any or what extent attributable to the default of the lessee, either before the drowning took place or since, is a point on which the evidence leaves me in the dark. I inclined certainly to the opinion, that if the drowning be not attributable to any default on the part of the lessees, and if it is of the character which the plaintiffs now suppose, the Court ought to give the plaintiffs their lease, because in that view, the plaintiffs will be in no default, and the defendants will have, and still have, all they would have in the mine, by force of the covenant contained in the lease. This question will be the subject of the inquiry I shall presently point

out. My ultimate decision on the third point made by the plaintiffs, will depend, in a great measure, on the result of the inquiry I have just referred to. The general rule of a court of equity I take to be this, that a party who asks the Court to enforce an agreement in his favour, must aver and prove he has performed, or has been ready and willing to perform, the agreement on his part. Where, however, the application of that general rule would work injustice, the Court would relax it. A breach of an agreement may have been committed for which a jury would only give nominal damages; a breach may have been committed, which a jury would consider as waived; and if the party committing the breach has performed those parts of the agreement whereby the other contracting party has derived benefit under the agreement at his expense, a court of equity might do great injustice by refusing to decree a specific performance of the agreement. The case of *Jones v. Jones* (13), though not exactly in point, illustrates the reason on which these observations proceed; but if it really has been by the default of the plaintiffs that the beneficial interest of the defendants in the mines has been wholly destroyed and suspended, and if, as the plaintiffs' counsel have averred at the bar, the plaintiffs want the means only to support and protect their buildings on the surface, and do not intend to work the mines, I am satisfied I shall be doing no more than justice in refusing to the parties the decree they ask. If this case depended, and so far as it does depend on the covenant for renewal, and on that only, I should at once direct the inquiry, which I shall presently state; but the plaintiffs contend, that they have a title to the renewed lease, wholly independent of the covenant for renewal, and of any covenants which they, or those under whom they claim, were under, during the original lease. They say, by the terms of the release of the 6th of October 1791, Carpenter was constituted a trustee for the lessees under whom the plaintiffs claim on two distinct trusts: first, on trust to grant the lessees a lease for forty-two years, with a covenant for a renewal for a further term of twenty-one years; and secondly, on trust to

(12) 2 Myl. & Cr. 709; s. c. 7 Law J. Rep. (N.S.) Chanc. 22.

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(13) 12 Ves. 186.

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grant that further lease for twenty-one years on request. The plaintiffs further insist, that inasmuch as the legal estate was absolutely vested in Carpenter, by conveyance from the owners, he thereby became trustee of the intended lessees, and such lessees became absolute owners in equity of the term, to the extent defined by Carpenter's trust, as in *Ellison v. Ellison*, *Pulvertoft v. Pulvertoft*, *Ex parte Pye*, and *Ex parte Dubost* (14). In answer to this, the defendants insist, that the intended lessees not having been parties to the release, the Court must look into the whole transaction, and determine whether the intention was to make Carpenter a trustee for the intended lessees absolutely, or whether he was not a trustee for the lessor, as in *Walwyn v. Coutts* (15) and *Garrard v. Lord Lauderdale* (16); and it is broadly contended for the defendants, that notwithstanding the conveyance to Carpenter on the trusts mentioned in the release of the 6th of October 1791, he was a trustee for the grantors, and not for the lessees; and the lessees, not having been parties to the release, could not have sustained a bill against Carpenter to enforce the supposed trust. It appears to me, that both parties have carried their arguments, on this part of the lease, further than it is possible they can be sustained. I cannot hold with the defendants' argument, that Carpenter was the trustee for the grantors in the release of the 6th of October 1791, and not to any extent the trustee of the intended lessee. The release recites a proposal by Banckes, Read, & Dumaresq, as co-partners, to accept a lease for forty-two years of the premises, for the purpose of getting and raising the coal, ironstone, and other minerals, in and under the same, and making iron thereon, and to become co-partners, and carry on such works and mines for their mutual benefit and advantage, on the terms and conditions, and in the manner intended to be specified and particularized in certain co-partnership articles, intended shortly to be executed between them; and that for the better accomplishing and effecting the intention of the parties, Read had applied to and prevailed on Cocker to join in the transaction, out of which the litigation

in this case has arisen. It appears, then, the proposed arrangement was carried out, the co-partnership between Banckes, Read, & Dumaresq, was formed on certain terms and conditions agreed on between them, and the partnership accepted the lease of the 7th of October 1791, entered on the premises comprised therein, and worked the mines; and if the lessors have, in fact, done all which, on their part ought to be done, I cannot but think that the Court would have given them the second lease on their own application, and have charged Carpenter with a breach of trust, if by any act of his the original lessees had been deprived of such lease; but I cannot, on the other hand, go the length of the plaintiffs' argument, that the trust declared in favour of the lessees, is so imperative, that this Court must now treat it as executed, and decree Carpenter to grant a lease for twenty-one years, irrespective of the conduct of the lessees during the antecedent term of forty-two years. Suppose a contract for the sale of land, the purchase-money to be paid on a future day, and the legal estate to have been conveyed by the vendor to a trustee in trust to convey to the purchaser, on a day later than that on which the purchase-money was to be paid: suppose the day for the conveyance to arrive, the purchase-money not paid, and the trustee to ask the direction of the Court, whether he should convey the estate to the purchaser or obey the directions of the vendor, and not convey it till the purchase-money was paid. In such a case a court of equity would not decree the conveyance to be executed till the purchase-money was paid. How does that case differ in principle from this? Here the lease for twenty-one years was to be executed on request, and might have been called for before the lessee could have been required to perform a single duty under the prior lease of October 1791, and the case is apparently distinguished from the case I suggested above in that particular, but in principle there is no difference. In each case the contract is mutual, and the conveyance or lease is to be executed in consideration of a duty to be done by the party claiming the conveyance or lease; and if that party has failed in his duty, at the time the Court is called upon to act, there is a failure of that consideration, without which

(14) 18 Ves. 140.

(15) 3 Mer. 707; s. c. 3 Sim. 14.

(16) 3 Sim. 1.

a court of equity ought not, in my opinion, to act, but to leave the parties to their legal remedies. I think, therefore, the question, on the alleged trust, must result in the same inquiry as the question on the covenant; or to use the expression of the defendants' counsel, the plaintiffs' rights, under the trust and under the covenant, are exactly co-extensive. Now, as to the way in which the question is to be tried, I think an issue is better, both for the plaintiffs and for the defendants. The issues will be two; first, whether the mines became drowned out by reason of any default in the lessees, in not fairly working the same according to the covenants in the lease; and secondly, whether it is by their default the mines have continued to be drowned out.

Jan. 24.—WIGRAM, V.C.—In this case I held, that I did not, upon the evidence before me, possess sufficient information to enable me safely to decide upon the rights of the parties, and I directed two issues, &c. I still think this would be the proper mode of deciding the cause, as it would enable the parties to get the opinion of a court of law upon the disputed construction of the covenant, as the proper working of the mines is a question of local custom. Both parties have, however, concurred in asking me to decide upon the evidence before me, which I have already declared to be unsatisfactory and insufficient. The only way that I can do this, is by determining upon which of the parties, plaintiffs or defendants, I ought to consider the onus of proof as resting, and by considering that party as not having established their case. Now, that onus I must hold to rest upon the plaintiffs. Up to 1815 the lessees worked the mines, and paid royalties. In 1815 they ceased doing so, and, according to my construction of the covenant, are chargeable with a breach of trust, unless they can shew that it was by no default of theirs. As they have refused the issues, they decline giving me that information. I cannot therefore, in favour of the plaintiffs, who have exclusive possession of the mines, and of the means of giving me that information, intend that, by properly working the mines, they might not, since 1815, have produced, and might not now produce rent to the lessors. I think, therefore, I cannot now do otherwise than

dismiss the bill with costs. The form of the order must be, "The plaintiffs and defendants, by the counsel, declining to try the two following issues, &c., let the bill be dismissed with costs."

K. BRUCE, V.C. } ILES v. DIXON.
March 14.

Costs—47th New Order of 1841.

Where the Master's report, in a creditors' suit, was made and confirmed previously to August 1841, the creditors were held not to be entitled to the costs of proving their debts under the 47th New Order of August 1841.

This was a creditors' suit. The usual inquiries as to debts having been directed, the report of the Master was made and confirmed previously to the New Orders of August 1841 coming into operation. The cause now coming on for further directions—

Mr. Simpkinson and Mr. Heathfield, for the creditors, contended, that the creditors, who had proved their debts before the Master, were entitled to their costs of proving them, under the 47th New Order of August 1841.

KNIGHT BRUCE, V.C. said, he had no disposition to extend the effect of that order, and that he did not consider the creditors entitled to their costs.

M.R. } GRIFFITHS v. EVAN.
March 19, 23.

Will—Limitations—Construction—Tenancy in Tail—Appointment—Estate for Life.

A, by will, gave to B, his eldest daughter, certain real estates, for and during the term of her natural life, and the life of her husband C, and after their several deceases to the use of the lawful issue of the body of B. for ever, and for want of such issue, the testator authorized B. to dispose of the estates by will, as she should think fit, "confiding in her that she would not alienate or transfer the estates from his nearest family." B, by her will, after referring to the power given her by A's will, gave to her husband C. the

real estates, for and during the term of his natural life; and after his decease she gave the same to D, the son of C, begotten on the body of J. W, the first wife of C, and her relation, and his lawful issue for ever, and for want of such issue to survive D, B. authorized D. to dispose of the estates to such person or persons as he by his last will should direct, limit, and appoint:—Held, that B. took an estate tail under the will of A, with a power of appointment, by will (B. having died without issue), in the nature of a trust, in favour of the heirs-at-law of D, and that the execution of the power of appointment by B. was void.

David Howell, being absolutely seised of two estates, called Troedyrhiwtrachwerw and Pwllgyassey, the former of which was subject to a term of 500 years, for securing to David William the sum of 300*l.*, and interest, duly made his last will, bearing date the 12th of January 1786, as follows, that is to say, “I give and devise unto my eldest daughter, Mary Evan, wife of Stephen Evan, all those estates called Troedyrhiwtrachwerw and Pwllgyassey, to have and to hold the same unto her, my said daughter, Mary Evan, for and during the term of her natural life, and the life of her husband Stephen Evan; and from and after their several deceases, to the use and behoof of the lawful issue of the body of the said Mary Evan, for ever; and for want of such issue, I do hereby empower and authorize her, my said daughter, Mary Evan, to sell and dispose of my said estate to such person or persons as she shall think fit, in and by one instrument, in writing, being her last will and testament, legally executed and attested by three credible witnesses, *confiding* in her, my said daughter, that she will not (by the said instrument) alienate or transfer my said estate from my *nearest family*; subject, nevertheless, and I do hereby charge my said estate to the payment of the mortgage already contracted and entered on by one David William.” The testator then charged his estates with the payment of 60*l.* to his three other daughters; and concluded his will as follows:—“And I do further recommend my said three daughters, Rachel, Hannah, and Esther, to the tender care and protection of my said daughter and devisee, Mary Evan, fatherly advising her to make

every further and additional provision for them in her power, as far as her circumstances will afford, on account that I have made this distinction, and preferred her to a higher station in the enjoyment of both my real and personal estate; and lastly, as to all my remaining goods, chattels, and personal estate whatsoever, I give and bequeath the same unto my said daughter, Mary Evan, whom I do hereby constitute and appoint sole executrix of this my last will and testament, to pay and discharge my legacies, debts, and funeral expenses, and to accomplish all things that shall belong to her as an executrix.”

David Howell died in the month of August 1788, and left Mary Evan, Rachel Evan, Hannah Howell, afterwards Hannah Griffiths, and Hester Howell, his only issue and co-heiresses-at-law, surviving him.

Mary Evan proved the testator's will, and her husband, in her right, entered into possession of the devised estates, and paid the legacies given by the will, and having satisfied the mortgage of 300*l.*, took a conveyance of the term of 500 years to his trustee. Mary Evan executed her will, bearing date the 18th day of February 1814, in the presence of and attested by four witnesses, which was as follows, that is to say, I, the said Mary Evan, do hereby give and devise all the estates called Troedyrhiwtrachwerw and Pwllgyassey, together also with all and singular my real estate, subject nevertheless to the payment of the mortgage contracted thereon, and subject also to the payment of my legal debts and incumbrances, whatsoever unto my husband, the said Stephen Evan, by virtue of my father's said will, to hold the same unto him, the said Stephen Evan, for and during the term of his natural life, with full power for him to cut thereon as much timber, trees, wood, and coppices as shall or may be sufficient only for his own use, on the said farm of Troedyrhiwtrachwerw, during his lifetime, but is not permitted to sell any. And my will further is, that the said Stephen Evan shall not sell any turfs from my said devised estate during his lifetime; and from and after the decease of the said Stephen Evan, I give and devise all the said estates, as well as all my real property, unto David Evan, son of my said husband, Stephen Evan, begotten on the body of Jennet Davies, his

first wife, and my relation, to hold the same unto him, the said David Evan, and his lawful issue for ever; and for want of such issue to survive him, I do hereby empower and authorize him, the said David Evan, to dispose of all my said devised estate to such person or persons as he, the said David Evan, in and by his last will and testament, legally attested, or otherwise, shall direct, limit, and appoint.

Mary Evan died in July 1823, without ever having had any issue, and Stephen Evan, her husband, proved her will in 1826, and remained in the possession of the devised estates until his death, intestate, in 1838, when David Evan took out letters of administration to his estate and effects, and entered into possession of the devised estates.

The bill was filed by the heirs-at-law of David Howell against David Evan, and stated, that the plaintiffs were alone equitably entitled to the devised estates, as the sole and only heirs-at-law, as well of David Howell as of Mary Evan, and as such "nearest family" as were pointed out by the will of David Howell, to take on failure of issue of Mary Evan. David Evan was the great-nephew only of David Howell, and Mary Evan never suffered any recovery of the devised estates. The bill prayed, that David Evan might be decreed to let the plaintiffs into peaceable possession of the said estates, and to account for the rents received by him or by Stephen Evan during his lifetime, and that the amount of David Evan's lien, if any existed, on the estates, might be set off against an equal amount of the monies that might be found due to the plaintiff, in respect of the rents received by him, or by the said Stephen Evan.

The defendant, by his answer, submitted, whether a due appointment was not made by Mary Evans to the defendant; and whether she had not full power, by law, to devise a life interest in the devised estates to her husband, unless he was otherwise independently entitled to such a life interest; and whether, on the decease of Mary Evan, without issue, the estates did not devolve on Stephen Evan for his life, with remainder to the defendant, as tenant in tail thereof, with such ulterior power of testamentary appointment, as in the will of Mary Evan expressed.

Mr. Pemberton and Mr. Jenkins, for the plaintiffs.—The word "confiding," used in the will of the testator, is tantamount to the expression, "in full trust and confidence;" and if Mary Evan was tenant in tail, then on her death the estate of her heirs-at-law vested in possession. It is said, she might dispose of the estate given her for her husband's life; but if there be a limitation to A, during the life of B, and after the death of B, then to the heirs of A, the rule in *Shelley's case* will apply; so that the estate *pour autre vie* in this case, coalesces with the estate for life given to Mary Evan, the donee of the power, and she not having selected one of the nearest relatives as the appointee, the execution of the power is void. Another objection to the defendant's claim is this, viz. Mary Evan had power given her to dispose, by will, of the fee simple of the estate, and this she has not done.

The following authorities were cited on behalf of the plaintiffs:—

Fearne, p. 83.

Wright v. Atkyns, 17 Ves. 255, and 19 Ves. 299.

Douglas v. Congreve, 1 Beav. 59; s. c. 8 Law J. Rep. (N.s.) Chanc. 53.

Doe v. Smith, 1 Bli. 1; s. c. 5 M. & S. 126.

Knight v. Knight, 3 Beav. 148; s. c. 9 Law J. Rep. (N.s.) Chanc. 35.

Ford v. Fowler, 3 Beav. 146; s. c. 9 Law J. Rep. (N.s.) Chanc. 352.

Clapton v. Bulmer, 10 Sim. 426; s. c. 9 Law J. Rep. (N.s.) Chanc. 261.

Mr. Kindersley and Mr. J. Evans, contra.—The plaintiffs' bill is in reality an ejectment bill, and nothing more; and the only ground on which an heir-at-law can come into this court, is to have a term of years, or some other obstacle to the trial of his right, removed out of his way; and in this case, the only term is that of 500 years, which affects only one of the two estates. The case raised by the bill is not that the power was well exercised at law and not in equity; and therefore, for anything that appears to the contrary, a court of law can very well decide the present case. This estate, as given to Mary Evan, is no doubt

an estate tail; and the only question is, when the estate tail is to take effect. The defendant insists that Mary Evan took an estate for the lives of herself and her husband, and that the estate tail took effect at the death of her husband, and not sooner. Should it be considered that the question is not a legal one, then the expression used in the will is so uncertain in its nature, that the testator must be considered as having used it, not as signifying a trust, but as a restriction only on the general powers given by him, and in the same sense as the words were construed in the case of *Knight v. Knight*. As to the word "family," different constructions have been put upon it, according to the context of the will in which it has been found; and in this case, both Stephen Evan and the defendant may properly be termed members of the family of the testator. Then the present case is distinguishable from *Wright v. Atkyns*, inasmuch as here the power is given at once, which was not the case in *Wright v. Atkyns*: and if Mary Evan might have appointed (as it is submitted she might have done) the estates by her will in favour of a grandchild, *i. e.* in favour of a son of one of the testator's deceased daughters, the appointment, in favour of the defendant, David Evan, ought to be deemed valid, he being a great-nephew of the testator, and therefore to be considered as one of his family.

The cases of—

Doe v. Joinville, 3 East, 172;

Sale v. Moore, 1 Sim. 534;

Robinson v. Waddelow, 5 Law J. Rep. (N.S.) Chanc. 350;

Meredith v. Heneage, 1 Sim. 542; were cited on behalf of the defendants.

The MASTER OF THE ROLLS—(after reading the testator's will)—observed, that the whole of the will must be taken into consideration, and, in his opinion, the gift therein contained to Mary Evan amounted to an estate tail; and that if the words of gift had stopped at the expression, "for want of such issue," Mary Evan would have had an absolute right to the property; but the testator went on to say (here his Lordship read that part of the will commencing with the words, "confiding," &c.), thereby indicating a desire that his daughter, Mary Evan, should have respect to his nearest family, that is, relations, in executing the power given her by his will. His Lordship then stated, that the only argument necessary to be considered was, as to the execution of the power, which was a qualified one; and in his opinion, imposed a trust on Mary Evan in favour of the testator's heirs-at-law, in case she should die without issue; for, with reference to real estates, such must be considered the meaning of the words, "my nearest family." The appointment therefore failing, the consequential relief must follow, and the defendant must account, in the character of mortgagee in possession, for the rents and profits received from the time of the death of Mary Evan, in 1823, either by Stephen Evan or the defendant; and although the answer alleged, that no timber had been sold from the estates, still it was not usual to take the oath of the defendant as final on such matters.

END OF HILARY TERM, 1842.

CASES ARGUED AND DETERMINED

IN THE

Court of Chancery.

EASTER TERM, 5 VICTORIÆ.

K. BRUCE, V.C. }
Feb. 19, 21, 22; } PARKER v. MARCHANT.
March 8, 18; }
April 18. }

Will—Devise—Legacy—Construction.

Under a gift in a will, to "my other servants 500l. each," a person in the service of the testator at the date of the will, but who had left it before his death, is entitled to a legacy of 500l.

Under a gift in a will to A, of "all my jewels, plate, linen, china, carriages, wines, and other goods, chattels, and effects whatsoever, as her own goods and chattels for ever," not merely goods and chattels of the same nature with jewels, &c., but all the personal property of the testator not otherwise disposed of, passes to A.

A testator by his will, after directing all his debts to be paid, and giving several legacies of stock and pecuniary legacies to a large amount, "then" gave and bequeathed to A. and B. all the rest and residue of his "ready money, securities for money, and monies in the funds," upon certain trusts. The will contained a residuary bequest:—Held, that the legacies were charged upon the ready money, securities for money, and money in the funds, but that the debts were not so charged, and ought to be paid out of the residue of the personal estate.

Balances in bankers' hands held to pass under the gift of ready money.

Whether, under a specific bequest of "ready money, securities for money, and money in the funds," these items, as they stood at the date of the will, or as they stood at the time of the testator's death, pass, quære. The decree, at the first hearing of the cause, having directed the Master to inquire only as to those items at the death, the Court is precluded, on further directions, from entering into the question.

The testator devised to A. and B. and their heirs divers freehold estates, and "all other his messuages, lands, tenements, and hereditaments, which might not be particularly described in his will." Whether chattel leaseholds passed under this devise, quære.

Under a gift in a will, of all "my securities for money," all the arrear of interest due at the death of the testator passes to the legatee.

Robert Parker made his will, bearing date the 24th of June 1829, which was in part as follows:—"I, Robert Parker, do make and declare this writing to be and contain my last will and testament. I direct in the first place all my debts to be paid; I then give and bequeath to my dear and affectionate wife Helen, 60,000l. of 3l. per cent. consols, part of a larger sum standing in my name in the Bank of England." After some pecuniary legacies, the will proceeded as follows: "Also I give and bequeath unto

my dear brother-in-law Sir Timothy Shelley, Bart., and Sir John Shelley Sidney, Bart., all the rest and residue of my ready money, securities for money, and monies in the funds, in trust to invest the same in their joint names, and to pay to, or permit and suffer my dear wife Helen, or her agent, for her use, to receive the dividends or interest of the same, during her life; and after her decease, for this further trust, to divide, transfer, and pay the said stocks and monies unto and amongst my cousins Thomas Marchant, John Marchant, and the children of my late cousin William Marchant, and the children of my late cousin Mary Knight: viz. one equal share to Thomas Marchant, one equal share to John Marchant, one equal share unto and amongst the children of William Marchant, and the remaining share unto and amongst the children of Mary Knight; the share of such child or children as shall be under the age of twenty-one years, when the same shall become transmissible by the decease of my said dear wife, shall be paid into the hands of the natural parent or next-of-kin, or guardian appointed, as the case may be. And I do direct, that the receipt or release of each of the said parties, children, parents, or others respectively, shall be a sufficient discharge to my said trustees for such share or shares respectively, and that they shall not be answerable for any more of my personal estate than shall come to their respective hands. As to my messuages, lands, tenements, and real estate, I do dispose thereof as follows:—I give and devise unto the said Sir Timothy Shelley and Sir John Shelley Sidney, and their heirs,” (divers freehold estates by their descriptions,) “and all other my messuages, lands, tenements, and hereditaments which may not be herein particularly described or mentioned, upon the following trusts, first, for the use of my said wife Helen, for the term of her natural life, and after her decease, to the use of the said Thomas Marchant and John Marchant, and the children of the said William Marchant and Mary Knight, in equal shares and proportions, as tenants in common. And I do further give and bequeath to my said wife, all my jewels, plate, linen, china, carriages, wines, and other goods, chattels, and effects whatsoever, as her own goods and chattels for ever.” The testator appointed his wife executrix of his will. The

testator made a codicil to his will, dated the 15th of March 1830, which was as follows:—“I give and bequeath to the following persons, who have lived many years in my family, viz. to Mrs. Down 1,000*l.*, to Mr. Jones 1,000*l.*, to Martha Isgrove 1,000*l.*, and to the other servants 500*l.* each. This writing I direct to be taken as a codicil to my will.”

The testator died in March 1837. The bill was filed by Mrs. Parker, the widow, for the administration of the estate. A decree was made in the cause, directing the Master “to take an account of the personal estate come to the hands of the executors, &c., and in taking such account to distinguish such parts of the estate as at the time of his death, consisted of ready money, securities for money, and money in the funds,” and to make the usual inquiries.

The Master made his report, whereby it appeared that Thomas Marchant had died in the lifetime of the testator; that one Ann Relf had been in the testator's service at the date of the codicil, but had quitted it between three and four years before the death of the testator; that the testator had died possessed of chattel leaseholds; that at the time of the testator's death, there were at Hobhouse's bank at Bath, where the testator resided, a balance of about 6,000*l.*, and at Child's bank in London, another balance of about 16,000*l.* The ready money, stock, and securities for money at the time of the death, were also found; and it appeared that there was due at the death, an arrear of interest on some of the securities for money. Mrs. Parker had died after the commencement of the suit, and her personal representative had filed a bill of revivor.

The cause now came on for further directions, and the following questions were submitted to the Court:—first, whether Ann Relf was entitled to a legacy of 500*l.*;—secondly, whether under the residuary clause, the wife became entitled to all the residue of the testator's estate not previously disposed of, or to those articles only of the same nature with jewels, plate, linen, china, &c.;—thirdly, whether the debts and legacies were to be paid out of the ready money, securities for money, and money in the funds, or out of the residue;—fourthly, whether the balances of the testator at the banks at Bath and London, were included

in the term "ready money;"—fifthly, whether the gift of ready money, securities for money, and money in the funds, had reference to those items as they stood at the date of the will, or at the death of the testator;—sixthly, whether the leaseholds passed by the general residuary devise to the trustees;—seventhly, whether the arrears of interest on the securities for money belonged to the specific legatees of the securities, or formed part of the residue.

Sir C. Wetherell, Mr. Wilbraham, and Mr. Lovat, for the plaintiff.—First, service being the cause of the legacy, continuing service from the date of the will to the death, was the condition on which it became payable—*Jones v. Henley* (1). Secondly, under the words "goods, chattels, and effects," everything not previously disposed of passed to the wife.

Campbell v. Prescott, 15 Ves. 500.

Mitchell v. Mitchell, 5 Mad. 69.

Hearne v. Wigginton, 6 ibid. 119.

Collier v. Squire, 3 Russ. 467.

Arnold v. Arnold, 2 Myl. & K. 368; s. c. 4 Law J. Rep. (N.S.) Ch. 123.

Saumarez v. Saumarez, 4 Myl. & Cr. 331.

Thirdly, the debts and legacies are payable out of the ready money, &c.—*Choate v. Yates* (2). Fourthly, 'the balances of the testator at the banks did not pass under the term "ready money."

Carr v. Carr, 1 Mer. 541, n.

Sims v. Bond, 5 B. & Ad. 389, 392.

Fifthly, the gift of ready money, &c. had reference to the date of the will. Sixthly, the leaseholds did not pass under the general residuary devise to the trustees—*Thomson v. Lawley* (3).

Against these claims it was contended, first, that Ann Relf was entitled to the legacy: on which point were cited—

Sherer v. Bishop, 4 Bro. C.C. 55.

Garratt v. Niblock, 1 Russ. & Myl. 629.

Secondly, the residuary clause passed only articles of the same nature with jewels, &c.

Sanders v. Earle, 2 Chanc. Rep. 98.

Roberts v. Cuffin, 2 Atk. 112.

Chapman v. Hart, 1 Ves. sen. 271.

Cavendish v. Cavendish, 1 Cox, 77.

(1) 2 Chanc. Rep. 162.

(2) 1 Jac. & Walk. 102.

(3) 2 Bos. & Pul. 303.

NEW SERIES, XI.—CHANC.

Hart v. Hart, 3 Bro. C.C. 311.

Bennett v. Batchelor, Ibid. 28.

Stuart v. the Marquis of Bute, 11 Ves. 656.

Rawlings v. Jennings, 13 ibid. 39.

(In this case, Sir W. Grant, M.R., in his judgment, remarks, that part of the property being particularly given to the wife afterwards, the word "effects" must receive a more limited interpretation. In the will, as given in the report, there is no such gift to the wife to be found. The registrar's book was produced in court, for the purpose of seeing whether any such gift was to be found there, but it agreed exactly with the report.)

Hotham v. Sutton, 15 Ves. 319.

Sutton v. Sharp, 1 Russ. 146.

Fourthly, the balances at the bank passed under the term "ready money."

Vaisey v. Reynolds, 5 Russ. 12.

Taylor v. Taylor, Jurist, 1837, p. 401.

Fifthly, the gift of ready money, &c. had reference to the death of the testator, and not the date of the will.

Gayre v. Gayre, 2 Vern. 538.

All Souls College v. Codrington, 1 P. Wms. 597.

Masters v. Masters, Ibid. 424.

Sheffield v. the Earl of Coventry, 2 Russ. & Myl. 317.

Sixthly, the leaseholds passed under the general residuary devise.

Rose v. Bartlett, Cro. Car. 292.

Hartley v. Hurle, 5 Ves. 540.

Dixon v. Dawson, 2 Sim. & Stu. 327.

Goodman v. Edwards, 2 Myl. & K. 759.

Sherratt v. Sherratt, Coop. Rep. temp. Brougham, 35.

And the cases cited in the argument in *Hobson v. Blackburn* (4).

Mr. Simpinson, Mr. Bethell, Mr. K. Parker, Mr. Koe, Mr. Roupell, Mr. Willcock, Mr. Tripp, Mr. Pitman, Mr. Walpole, Mr. F. J. Hall, Mr. Glasse, Mr. Hood, Mr. Lewin, Mr. Whatley, and Mr. Dumergue, for the different defendants.

KNIGHT BRUCE, V.C.—There are several questions in this case, arising on the will of Robert Parker, who died in 1837. It will be convenient to dispose first of the codicil. I think these are general pecuniary legacies,

(4) 1 Myl. & K. 575.

2 G

given and payable out of the general personal estate, and not otherwise. I am of opinion that, under the gift "to the other servants," Ann Relf is entitled to a legacy of 500*l*. The codicil does not shew that the testator annexed to the gift the condition of continuing service. Although persons are described by the character they have at the time of the will, it is not necessary that that character should continue to the death. The case of *Jones v. Henley* did not turn on the same language as that before the Court. In the *Digest* there is the following opinion of Ulpian:—"Si cognatis legatum sit, et hi cognati quidem esse desierint, in civitate autem maneat, dicendum deberi legatum: cognati enim testamenti facti tempore fuerunt. Certe si quis testamenti facti tempore cognatus non fuit, mortis autem tempore factus est per adrogationem facilius legatum consequitur." *Dig. lib. xxxiv. tit. v. l. 19*. How far the latter principle has been adopted by this Court, there is no occasion now to consider, but the former part is in conformity with our principles.

The next question is, whether the beneficial interest in the general residue passed to the wife, or whether the testator died intestate as to it. This turns on the meaning that is to be attached to the words "goods, chattels, and effects," having regard to their position found in the will, and the whole contents of the will. Lord Cottenham, in *Saumarez v. Saumarez*, has expressed his assent (in which I fully agree with him,) to the general rule of construction laid down by Lord Eldon, in *Church v. Mundy* (5), "that the best rule is, to take the words to comprehend a subject which falls within their usual sense, unless there is something like a declaration plain to the contrary." The terms "goods, chattels, and effects," or any of them, in their proper and natural sense, are sufficiently large to pass the absolute interest in the whole personal estate. A will may be worded, so as to shew by reasonable construction, that the testator intended to use the words in a limited sense, and, if that intention can be collected from the will, the Court is bound to give effect to it. It lies, however, upon those who would restrict them to shew that a reasonable construction of the will requires a departure

from the ordinary sense of the words used by the testator. Such is the rule, and to the test of it the gift in question must be submitted.—[His Honour stated the general effect of this will, and read the residuary clause.]—It may be remarked here, first, that the clause does not contain any limitation in point of locality;—secondly, that large generic terms follow the specific terms "jewels," &c.;—thirdly, no disposition or expression, evidencing any intention or belief in the testator's mind, that there was anything not expressly disposed of by the will, that the clause did not give to the wife, can be found in the will or codicil;—fourthly, the gift to her is followed by making her executrix, and is contained in that part of the will where the disposal of the residue, if any is made, would be expected to be found. These are only met by a rule of frequent, but not universal, application—that general terms following specific articles, must be held to mean things *eiusdem generis* with the particular things given—*Stewart v. the Marquis of Bute* (6), and *Hotham v. Sutton*.—[His Honour here cited the opinions of Lord Cottenham, in *Arnold v. Arnold*; of Sir W. Grant, in *Campbell v. Prescott*; of Sir J. Leach, in *Mitchell v. Mitchell*.]—Acting upon the principle contained in these cases, and in *Church v. Mundy*, and recollecting that general words have *primâ facie* a general and unlimited meaning when applied to personality, I see no judicial ground for saying, that the testator intended to use them in any other way. I conceive, that this interpretation will be consistent with propriety of language, and probably conformable to the views of the testator, as collected from other parts of the will. Declare, that according to the true construction of the will, the plaintiff, in the right of Mrs. Parker, is entitled to the whole residue not otherwise disposed of.—[His Honour here remarked the discrepancy between the terms of the will and the judgment of Sir W. Grant, in *Rawlings v. Jennings*, mentioned in the argument for the defendant.]

The next question is, whether the testator's debts and pecuniary legacies are payable primarily out of the ready money, and securities for money, and money in the

(5) 15 Ves. 396, 406.

(6) 11 Ves. 656.

funds, or solely out of the residue. Here, also, the general rule must be applied, unless from the will or codicil a contrary intention of the testator can be shewn—*Choate v. Yates*. The words “then,” and “rest and residue,” have been relied on, as shewing such an intention. By the first passage, the testator has made the real estate equitable assets for the purpose of the debts, but it has not been charged primarily or *pari passu*, and has only been rendered liable in case of necessity. As to the ready money, securities for money, and money in the funds, which are in the nature of specific bequests, he could not by law give them otherwise than subject to his debts. The word “then” shews that, without meaning to depart from the usual rule in such cases, he merely recognized the claims of creditors over the objects of his bounty. I find it impossible to say, that the plaintiff has done more than to bring the point into doubt, if he has done that; and he must make the matter clear before he can ask the Court to depart from the general rule. As to the pecuniary legacies, the case is different. The will, I think, recognizes these legacies as deductions from the ready money, securities for money, and money in the funds. Looking at the whole language of the will, and the final clause, there is the intention manifest, that the ready money, &c. should be primarily, if not solely, charged with the legacies. Declare accordingly. The lapsed share must bear its proportional part of the burden.

The next question is, as to the ready money. There are two sums of about 6,000*l.* and 16,000*l.*, described in the Master's report,—the one, as the balance at the time of the death of the testator, in the hands of Hobhouse & Co., of Bath; and the other, as the balance on the testator's banking account with Messrs. Childs, of London. The argument made at the bar assumes that these were ordinary bankers' balances, and did not bear interest, and that the testator might have drawn cheques, payable to the bearer, of the whole. In *Carr v. Carr*, such balances would have passed under the term “debts,” but this is not conclusive as to their not passing as ready money. There are many difficulties which might arise as to the construction of these words, but which do not exist here; as, where a testator by

contract is not allowed to reduce his balance below a certain amount without previous notice, where interest is payable on it, where the drafts are not payable at once, where debts are left by the same will; but such possible difficulties ought not to prevent the Court from giving effect to the language of the will. Such a balance is a debt due, for the party may sue for it; and yet it is equally true, that it may be considered as ready money. People say, they have so much at their bankers', but not a debt due from them. A man who has not enough in his house to pay a tradesman's bill, says, he has not so much in the house, not that he has not so much ready money. Money is placed at a bank to be ready, as well as safe, and available for every exigency. In a work of great authority, a bank is described as a repository where money is occasionally lodged (*Johnson's Dictionary*). It is true, the banker is not bound to return the money deposited in specie, but this is too thin and narrow a distinction to affect the Court. As my opinion differs in some respects from that of Sir William Grant, in *Carr v. Carr*, I have not arrived at this conclusion without distrust; but I have the relief of knowing, that it is in accordance with the opinion of Sir John Leach, and the present Master of the Rolls.

The plaintiffs' counsel claimed so much of the securities for money and ready money as had been acquired by the testator subsequently to the date of the will; but, throughout the cause, all the parties have been under the impression, that the testator intended to bequeath all that he should have at his death.—[His Honour here stated the terms of the decree directing the account, and said]—I have come to the conclusion, that I do not consider it open to me to raise the question. I do not declare or intimate whether it is or not the true construction of the will. If this claim is to be pressed, the cause may be re-heard before the Lord Chancellor.

As to the leaseholds, the construction is not so clear as to induce me to decide it without sending it to a court of law. A case would be better than an action.

The arrear of interest on the securities for money belongs to the specific legatees, and does not form a part of the residuary

estate—*Hawley v. Cutts* (7), *Harcourt v. Morgan* (8).

For the convenience of the bar, I may mention, that besides the cases cited I have referred to *Brown v. Groombridge* (9), *Philips v. Eastwood* (10) (as to the payment of the debts), *Edward v. Barnes* (11) (leaseholds), *Doe v. Evans* (12) (general words), *Webb v. Honor* (13), and *Jones v. Curry* (14).

This cause had been transferred to His Honour's paper, from the Vice Chancellor of England.

Sir C. Wetherell applied to His Honour to rehear the cause, for the purpose of obtaining his opinion on the question, whether the gift of ready money, securities for money, and money in the funds, was to be confined to those items, as they stood at the date of the will. He argued, that as the Vice Chancellor of England could have reheard it, His Honour, who might be considered as representing the Vice Chancellor of England, as far as the causes that were transferred were concerned, might also rehear it.

His Honour, however, on referring to the 22nd section of 5 Vict. c. 5, considered that it was not competent to him to rehear it.

K. BRUCE, V.C. }
Mar. 19, 23; } BARNES v. RACKSTER.
April 22. }

Mortgage—Marshalling Securities.

R. mortgaged Whiteacre to A, then mortgaged Whiteacre to B, then mortgaged Whiteacre and Blackacre to A, on the occasion of a further advance from A, and made both Whiteacre and Blackacre liable to the whole mortgage debt due to A; and lastly, mortgaged Whiteacre and Blackacre to C. Whiteacre was insufficient to satisfy the first mortgage debt due to A, and the mortgage debt due to B; and Whiteacre and Blackacre were insufficient to satisfy A, B and C:

(7) Freem. 23.

(8) 2 Keen, 274.

(9) 4 Mad. 494.

(10) L. & G. Rep. Temp. Sugden, 270.

(11) 2 Bing. N.C. 252.

(12) 9 Ad. & El. 719.

(13) 1 Jac. & Walk. 352.

(14) 1 Swanst. 65.

Held, that B. had no equity, as against C, to throw the whole mortgage debt due to A. on Blackacre alone, but that this debt ought to be thrown rateably, and pari passu, on Blackacre and Whiteacre.

The bill in this case was filed by a mortgagee against a mortgagor and other mortgagees, for the purpose of obtaining payment of different sums of money advanced by him, on the security of different real estates.

By a decree made at the hearing, the Master was directed to sell the estates. By the report it appeared, that the estates had been sold, and the purchase-money paid into court.

On the cause coming on for hearing on further directions, the following question as to priorities of mortgagees, and of marshalling securities, arose:—

The mortgagor, Rackster, in 1792 was seized of two estates; one of which was called Foxhall, and the other, from its being numbered 32 in a plan referred to in the report, was, in the discussion, called No. 32.

In 1792, Rackster mortgaged Foxhall to Barnes; in 1795, he mortgaged Foxhall to Harkright. In 1800, Rackster, on the occasion of a further advance having been made to him by Barnes, mortgaged both Foxhall and No. 32 to Barnes, and made both estates liable to the whole mortgage debt due from him to Barnes. In 1801, Rackster mortgaged both Foxhall and No. 32 to Williams.

Harkright had notice of the first mortgage to Barnes; Barnes of the mortgage to Harkright; and Williams of all the proceedings affecting these estates.

The purchase-money of Foxhall alone, was not sufficient to pay what was due to Barnes on his first mortgage, and what was due to Harkright; and the purchase-money of Foxhall and No. 32 was not sufficient to pay Barnes, Harkright, and Williams, in full. In this state of things Barnes was, of course, indifferent as to the source out of which he was to be paid. Harkright's claim was, that as Barnes had both Foxhall and No. 32 to go upon, whereas he had only Foxhall, Barnes should be paid out of No. 32 alone, and that Foxhall should be

left to him ; that this equity clearly accrued to him on the execution of the mortgage of 1800, and was not to be divested by any subsequent transactions. This claim was resisted by Williams, who insisted that Barnes should be paid the mortgage debt due on the security of 1792, out of Foxhall alone, so as to leave No. 32 for him ; or that at least the whole mortgage debt due to Barnes should be thrown rateably on Foxhall and No. 32.

Mr. Swanston, Mr. Rasch, Mr. Cooper, Mr. James Parker, Mr. Wigram, and Mr. Elderton, appeared for the different parties.

KNIGHT BRUCE, V.C.—It is plain that, had the matter rested solely between Barnes, Harkright, and Rackster, the contention of Harkright must have been successful. This nobody denies. Is it, however, the same in the actual state of things ? It cannot be said, that the right which Harkright claims arises on any contract made with him affecting No. 32. Barnes and Rackster could have sold No. 32 to a stranger for value, so as to relieve it wholly from all charge but that of Williams ; Harkright could not have filed a bill for the purpose of redeeming Williams as to No. 32. Could not Williams have bought up Barnes's security ? The rule laid down in *Lanoy v. the Duke of Athol* (1), does not apply to a person in Harkright's situation, where, before a person in Barnes's situation has come for payment, the mortgagor has dealt for value in favour of a stranger. This equity is not to be enforced against a stranger, as it would have been against the mortgagor himself. I think, on the whole, that the mortgage debt due to Barnes on the securities of 1792 and 1800, should be thrown rateably on Foxhall and No. 32. I do not think Harkright is entitled to more than what is left of Foxhall after such payment.

In accordance with a wish expressed by his Honour, the case was elaborately argued on a subsequent day, by—

Mr. Cooper and Mr. James Parker, for Williams ; and *Mr. Swanston and Mr. Rasch*, for Harkright.

The following cases and authorities were cited and commented on :—

(1) 2 Atk. 446.

On the question of marshalling securities :—

Lanoy v. Duke of Athol, 2 Atk. 444, 446.

Aldrich v. Cooper, 8 Ves. 381.

Ex parte Kendall, 17 Ves. 514, 520.

Gwynne v. Edwards, 2 Swanst. 289, n.

Gregg v. Arrott, Llo. & G. temp. Sugd. 246.

Averall v. Wade, Llo. & G. temp. Sugd. 252 ; 3 Sugd. V. & P. 432.

Shalcross v. Dixon, 5 Jarm. Bythe. 493 ; s. c. 7 Law Journ. Rep. (N.S.) Chanc. 180.

Aldridge v. Forbes, 4 Jur. 20 ; s. c. 9 Law Journ. Rep. (N.S.) 37.

Hartley v. O'Flaherty, 1 Beat. 61 ; and Llo. & G. temp. Plunk. 208 ; s. c. 1 Story Eq. Jur. 518, 519, on the doctrine of the civil law on the subject of marshalling.

As to marshalling in the case of liabilities of sureties :—

Copis v. Middleton, Turn. & R. 224.

Dering v. Lord Winchelsea, 1 Cox, 318.

Mayhew v. Crickett, 2 Swanst. 185.

KNIGHT BRUCE, V.C.—Without entering into the rights and equities of the parties in different circumstances from the present, I retain the opinion which I expressed before,—that Foxhall and No. 32 ought to bear the sums due to Barnes rateably and *pari passu*. This would have been the case if Rackster had died intestate, and the properties had gone in different directions ; at least, the heir of Foxhall could not have insisted on anything more. It was a mere accident that No. 32 was mortgaged to Barnes ; it was a matter in which he had neither privity nor concern. Could not Barnes and Rackster have sold or mortgaged No. 32 to a stranger, leaving Harkright to his security ? Why should Rackster have been prevented ? It would be more than justice to Harkright, and less than justice to Rackster, to hold otherwise. Harkright had no equity to prevent Rackster from carrying the estate to market, or selling or pledging it. Harkright is not, therefore, to be entitled to more than what is left of the purchase-money of Foxhall, after such payment to Barnes.

K. BRUCE, V.C. }
 April 25. } HOSKING v. NICHOLLS.

Legacy—Trustee—Costs.

A legacy of "4,000l. capital stock in the 3l. per cent. consols, or in whatever of the government funds the same should be found vested:"—Held, to be demonstrative or specific.

Where a bill was filed by one set of infant cestui que trusts against a trustee and another set of infant cestui que trusts, in respect of a breach of trust committed by the trustee, the trustee was decreed to pay the costs of the plaintiffs only.

A testator, by his will, gave and bequeathed to the defendant Nicholls, his executors and administrators, "4,000l. capital stock in the 3l. per cent. consols, or in whatever of the government funds the same should be found vested," upon trust that he should assign and transfer the said last-mentioned capital stock unto and among the children of his two cousins, in equal portions. The testator was, at the time of his death, possessed of the sum of 4,100l., 3l. per cent. consols, which was applicable to the trust declared by the testator in favour of the children.

Nicholls having sold out the stock, a bill was filed by the infant children of one of the cousins against Nicholls and the infant children of the other cousin, in respect of this breach of trust. Nicholls was decreed to pay what was due to the infants into court, and the costs of the plaintiffs.

A question was then made, with reference to the sum to be paid by Nicholls, whether the legacy given for the benefit of the children was general or specific; that is, whether the dividends on the stock were payable from the death of the testator, or from the end of the first year.

Mr. Simpkinson and Mr. Hurd, for the plaintiffs.—In *Parrott v. Worsfold* (1), the Master of the Rolls laid down the rule, that there could not be a specific legacy of what the testator might be possessed of after the date of his will. In *Fountain v. Tyler* (2),

however, a bequest out of stock of which the testator might be possessed at his death, was held to be a specific legacy, and Lord Cottenham in *Belhune v. Kennedy* (3), though without referring to *Parrott v. Worsfold*, overruled the doctrine contained in it. *Ashton v. Ashton* (4) was also cited.

Mr. Cooper and Mr. Sheffield, for the defendant Nicholls, argued, that there had not been a reference to the stock sufficiently distinct to make the bequest a specific one. They relied also on Parrott v. Worsfold.

Mr. Rolt, for the infant defendants.

KNIGHT BRUCE, V.C.—The effect of a general legacy was obtained by the words, "4,000l. capital stock in the 3l. per cent. consols," and had the testator stopped there, the legacy would have been a general one; but having gone on to say, "in whatever of the government funds the same be found vested," I think he must be taken to have meant the legacy to be demonstrative or specific. I do not lay much stress on the direction to transfer; but those words aid the construction I have given to the bequest. It has always been held, that a legacy of stock out of stock was demonstrative; and the testator has here intimated an intention that there was to be a legacy of stock out of stock. I think, therefore, that the dividends are payable from the death.

Mr. Rolt, on the part of the infant defendants, applied for their costs.

KNIGHT BRUCE, V.C. said, he should not make the defendant Nicholls pay more than one set of costs. There was no kindred required, to enable a person to sue as the next friend of infants, and the infant defendants might and ought to have been plaintiffs. The defendant should pay one set of costs, and the difference between the costs thus paid, and the sum of the costs of the plaintiff and defendant infants, must come out of the fund.

[See *Stephenson v. Dowson*, 3 Beav. 342; s. c. 10 Law J. Rep. (n.s.) Chanc. 93.]

(3) 1 Myl. & Cr. 114.

(4) Ca. temp. Talb. 152.

(1) 1 Jac. & Walk. 594.

(2) 9 Price, 94.

L.C.
 April 20; May 2. } HOLLIS v. BRYANT.

*Bankruptcy—Uncertificated Bankrupt—
 Insolventcy—Pleading—Receiver.*

A commission of bankrupt, many years ago, was issued against B, the validity of which was contested by him. A compromise was afterwards entered into between B. and his creditors under the commission, B. paying a sum of money to them in satisfaction of their debts; but he never obtained his certificate under the commission, or caused the same to be superseded. B, whilst resident within the rules of the Queen's Bench prison, continued in the receipt of the rents of certain estates, over which he exercised an undisturbed ownership, and had detainers lodged against him, at the prison, by some of his creditors. The assignees, appointed under the commission of bankrupt, having died, the commission, and the proceedings under it, were transferred to the Court of Bankruptcy, and an official assignee was appointed under the same. Afterwards a creditor, who had matured his debt, by proceedings at law, into a judgment, dated subsequently to the issuing of the commission, and who had been appointed the assignee of B's estate under the Insolvent Debtors Act, filed a bill against B. and the official assignee, praying the appointment of a receiver over the estates of which B. was in possession; and on motion of the plaintiff, on affidavit, a receiver was ordered to be appointed.

This was an appeal from an order of the Vice Chancellor of England, appointing a receiver in this cause. The facts of the case were shortly as follows:—Many years ago a commission of bankrupt was issued against the defendant Bryant, which he contested, and at last a compromise was entered into between him and his creditors under the commission; the defendant, Bryant, paying a certain sum of money, which the creditors accepted in satisfaction of their debts, and no further proceedings were taken under that commission; the original assignees under the commission were dead, and a short time back the proceedings under that commission were transferred to the Court of Bankruptcy; and Belcher, the other defendant on the record, was appointed official assignee. The plaintiff Hollis was

a creditor of Bryant, not under the bankruptcy, but a creditor upon a transaction arising many years after the date of the commission of bankrupt; not being able to obtain payment of his debt, he brought an action in the Court of Common Pleas against Bryant, and recovered judgment in that action. The defendant Bryant had, for many years of his life, lived in the rules of the Queen's Bench prison, and in consequence thereof, a detainer was lodged against him, on behalf of the plaintiff Hollis. Upon the lodging of that detainer, the plaintiff Hollis applied to the Insolvent Debtors Court to be appointed assignee under the provisions contained in the act relating to insolvent debtors, which are of a compulsory nature: that application was resisted by the defendant Bryant, who appeared before that Court by counsel, but the result was, that the order sought by the plaintiff was made, and he was appointed assignee; and there was a vesting order made by the Insolvent Debtors Court, which, it was contended, was not valid. The vesting order was founded on a debt due to a Mr. Burt. The defendant Bryant, who never applied for his certificate under the commission, contended, that that debt was satisfied, and that there was an engagement that the order should be discharged; but the order never was discharged, and was a subsisting order; and therefore, when the plaintiff Hollis was appointed assignee under the Insolvent Debtors Act, all the right and interest, subject to the existing bankruptcy, which the defendant Bryant had, in any part of his property, vested in that assignee. The plaintiff Hollis endeavoured to compel the defendant Bryant to file a schedule under the Insolvent Debtors Act, but he was not successful in that application; and, in truth, that act is defective in that particular, for there are no adequate means by which the commissioners of the Insolvent Debtors Court can, under the clauses of the act, compel a party to file a schedule. The plaintiff Hollis attempted also to recover his debt by some application under the bankruptcy, but not being a creditor under the commission, his application in that respect was unsuccessful; he had, therefore, no alternative but to file a bill against the bankrupt Bryant and the official assignee appointed under the commission issued

against him, praying an injunction against the defendant Bryant's receiving the rents of the estates, of which he was in possession as apparent owner, and the appointment of a receiver thereof.

Mr. Wakefield and *Mr. Steere* appeared in support of the appeal.

Mr. Anderdon and *Mr. Terrell*, *contrà*.—For the appellant it was insisted, that it was unnecessary for the plaintiff to have recourse to this Court, and that the Insolvent Debtors Court was the proper court to administer relief to the plaintiff and the rest of the creditors of the insolvent; and that the form of the bill was wrong, in joining the insolvent with the official assignee as co-defendants.

The cases of—

Nias v. Adamson, 3 B. & Ald. 225;
Crofton v. Poole, 1 B. & Ad. 568; s. c.
 9 Law J. Rep. K.B. 59.
Drayton v. Dale, 2 B. & C. 293; s. c.
 3 D. & R. 534; 2 Law J. Rep.
 K.B. 20.

were cited.

The LORD CHANCELLOR, after detailing the facts of the case, proceeded as follows :—Adverting to the 40th section of the act, 1 & 2 Vict. c. 116, it is quite clear the plaintiff could not proceed under that act, because in consequence of the existence of the commission of bankrupt, the assignment which was made to the plaintiff was not valid for any beneficial purposes to him. It was valid only so far as it enabled him to conduct certain inquiries with respect to the state of the defendant Bryant's property; but it is expressly provided, that though not valid in its original operation, so as to give the party any means of obtaining payment of his debt, it is valid for the purpose of inquiry; and when a certificate under the commission is obtained, then the order becomes valid for all purposes; therefore, until a certificate is obtained under that commission, or until the commission is superseded, that order is, in point of fact, for all beneficial purposes to the plaintiff Hollis, suspended, and is inoperative. But it is perfectly clear, that the defendant Bryant will not take steps to supersede his commission; neither will he take proceedings

for the purpose of obtaining his certificate; and therefore the vesting order remains for all beneficial purposes suspended. Such being the state of things, what alternative had the plaintiff in this case to pursue, but to institute a proceeding like the present? I am of opinion, that the plaintiff's proceeding is perfectly regular, and the order for the appointment of a receiver follows, as a matter of course, if that right be affirmed. The order of the Court below must be affirmed.

K. BRUCE, V.C. } NEILSON v. HARFORD.
 May 5.

Practice.—*Time to answer.*

Where a defendant obtains from the Master further time to answer, on grounds which have reference to an answer only, the order drawn up on such application, ought to contain the words "answer alone," and not the words "plead, answer, or demur, not demurring alone."

A defendant in this cause obtained from the Master three weeks time to answer, on grounds that had reference to an answer only. The order, as drawn up, gave the defendant three weeks time "to plead, answer, or demur, not demurring alone."

Mr. Russell and *Mr. Campbell* moved to discharge this order, on the ground, that upon the case made out by the defendant before the Master for further time, that indulgence ought not to have been granted.

Mr. Roupell, *contrà*.

KNIGHT BRUCE, V.C. said, that upon the merits he should have refused the motion with costs, but that in point of form the order must be amended. The defendant had applied to the Master for further time, on grounds that had reference to an answer only, and the order ought to have been drawn up, so as to give him three weeks time to "answer alone," and not in the form before the Court.

Note.—See *Brooks v. Purton*, *supra*, p. 73.

M.R.	} LANGTON v. HORTON.
1841.	
Dec. 7, 20.	
1842.	
Jan. 14, 15;	
Apr. 18.	

Ship and Shipping—Registry Act, 3 & 4 Will. 4. c. 55.—Bill of Sale—Assignment—Mortgage—Cargo—Appurtenances—Construction.

B, being possessed of one-half of a vessel engaged in the South Sea whale fishery, executed to H. a bill of sale thereof, and of one-half of the masts, sails, tackle, boats, oars, and appurtenances belonging to the vessel, in consideration of a sum of money, the payment of which was secured by certain bills of exchange, accepted by H. in favour of B, and for B.'s accommodation:—Held, that a cargo of oil acquired after the date of the bill of sale, did not pass to H. under the same.

Semble—The cargo of a whale vessel is not of the nature of freight.

Semble—The act 3 & 4 Will. 4. c. 55. (the Ship Registry Act,) does not prevent a court of equity, on a proper case being shewn, from enforcing as a mortgage security, an instrument which has been duly registered, and which appears on the face of it to be an absolute bill of sale of the vessel.

In the beginning of the year 1837, the defendant Birnie, trading under the firm of Alexander Birnie & Co., was considerably indebted to the defendant Horton, who was a provision-merchant, (Birnie being a ship-owner, and engaged in the South Sea whale fishery). The debt due to Horton was secured by acceptances of Birnie, which were then running, and Birnie having occasion for further advances, requested Horton to afford him further accommodation; at that time Birnie was the owner of a moiety of the ship *Ann*, and her stores, and, with a view to obtain the further accommodation which Birnie required, he addressed to Horton a letter which was in these words:—

“London, 27th of January 1837.

“Dear Sir,—From the difficulties at present existing in the money market, I am desirous of making the following arrangement with you: to grant you a bill of sale of the moiety I hold of the ship *Ann*, and stores, and deposit with you a policy of in-

Insurance Company on that vessel, and to value on you in bills, to the extent of 4,200*l.*, which bills I engage to provide for, when at maturity, and I propose to pay out of the bills drawn on you, my acceptances falling due as under.” Then the letter set forth the three bills then outstanding, which were payable at different periods in February and March 1837, and concludes thus, “You further putting me in funds for 850*l.*, as soon as you may be able to do so, say by the 1st of March.”

The proposal made by this letter was acceded to by Horton, and was the foundation of the transaction, the effect of which is, the subject of the contest in this cause. Horton accepted four bills of exchange, which were drawn upon him by Birnie, for several sums, amounting in the whole to 4,200*l.*, which were made payable at different dates, and Birnie executed a bill of sale, whereby it was purported, that in consideration of 4,200*l.* paid by Horton to Birnie, he, Birnie, granted and sold to Horton his thirty-two 64th parts of the ship *Ann*, then on a voyage to the southern whale fishery, together with thirty-two 64th parts of all and singular the masts, sails, sail-yards, anchors, cables, ropes, cords, guns, gun-powder, ammunition, small arms, tackle, apparel, boats, oars, and appurtenances whatsoever to the ship belonging, or in any-wise appertaining, to hold the same to Horton, his executors, administrators, and assigns, to his and their own use for ever.”

Horton caused the bill of sale to be registered on the 1st of February 1837, as an absolute bill of sale, and the bills of exchange were several times renewed, and on the occasion of the last renewal, five bills were drawn, amounting to 6,200*l.*, by Horton, and accepted by Birnie, (as previously agreed on,) who paid for the stamps and the amount of the commission and discount charged on each renewal of the bills. Shortly after the date of the last set of renewed bills, and about June 1838, Birnie became embarrassed in his circumstances, and stopped payment, up to which time he acted as owner of a moiety of the vessel, by paying monthly money to the families of some of the crew of the vessel, in respect of their wages, and by effecting insurances on his moiety of the vessel, and otherwise. After the registry of the bill of sale, and in August 1837, Horton

insurance for 3,000*l.*, effected in the Marine wrote to Macduffie, the clerk of Birnie, the following letter :—"Dear Sir, inclosed I return the surplus paid me on the 29th, (103*l.* 5*s.* 9*d.*); there is a bill due on the 12-15th of September, for 800*l.* 5*s.*, and another on the 27-30th, for 692*l.* 17*s.*, which, as the *Foxhound* is arrived, I hope Mr. B. will take care of. Do you not think, if he requires a continued assistance on the moiety of the *Ann*, that the present mode of valuing on me is not so expedient as the reverse would be? Pray speak to Mr. B. on that point, as, for my credit sake, I should be glad it were on the best footing." Horton did not attempt to act as absolute owner of the vessel till July 1838, and on the 4th of July 1839, Birnie being greatly indebted to the plaintiffs, executed to them a mortgage of the equity of redemption of his moiety of the ship *Ann*, and of the cargo, stores, &c. Notice of this mortgage was given to Horton by the plaintiffs on the 5th of July 1839. On the 4th of July 1839, the plaintiffs' mortgage was tendered to the proper custom house officer to be registered, but he declined to register the same, on the ground, that Horton appeared by the register to be the absolute owner of the vessel. On the 8th of July 1839, the vessel arrived in the port of London with a large and valuable cargo of oil acquired after the date of the bill of sale: On the 10th of July 1839, the plaintiffs gave written notice to the proper custom house officer, that the assignment of the moiety of the vessel, masts, &c., by Birnie to Horton, was in reality only a mortgage security, and not an absolute sale thereof. On the 9th of the same month of July, the plaintiffs gave a written notice to the captain of the vessel not to part with a moiety of its cargo to any other person than the plaintiffs; but, notwithstanding such notice, Horton obtained possession of the whole of the cargo, and disposed thereof for a considerable sum, the moiety whereof far exceeded in amount the sum due from Birnie to Horton. The bill was filed by the plaintiffs (Langton and Becknell) against Horton and Birnie, and prayed for an account of the cargo brought home by the vessel, and of the money received by Horton in respect thereof, and that he might be decreed to pay to the plaintiffs a moiety of the residue of the

money, after deducting a due proportion for payments made by him, on account of the master and crew of the vessel, and for insurance, and might be decreed to deliver up to the plaintiffs any part of the moiety of the cargo which might remain unsold, and that an account might be taken of the amount due to Horton, in respect of his mortgage of the moiety of the ship, masts, &c.

Mr. Pemberton and *Mr. C. Hall*, for the plaintiffs.—If Horton was the purchaser of the moiety of the vessel, he ought to have taken up the bills of exchange for the 4,200*l.*, and to have been at the expense of the renewal of them, and not to have charged Birnie in account with discount, commission, and stamps, as he has done. The whole proceedings between the parties are consistent only with the fact of Horton being a mortgagee and not a purchaser, either absolute or conditional, (the bill of sale and the letter of the 27th of January 1837, being expositions of each other). Horton, however, says he became the absolute owner of Birnie's moiety of the vessel and cargo, by virtue of the bill of sale, whereas not a word is found in that document about the cargo, the assignment being merely of a moiety of the ship's hull, machinery, tackle, &c., and there is no colour of title whatsoever, in the defendant Horton, to the moiety of the cargo. It will then be said, that the bill of sale passed the freight and earnings that accrued, as incident to the ship, but no freight or earnings accruing after the date of the bill of sale will pass by it, and therefore no part of the subsequently acquired cargo will pass by the bill of sale, supposing it to be part of the ship's freight. In *Davenport v. Whitmore* (1), where Lord Chancellor Cottenham differed in opinion from this Court, the vessel was never registered according to the Ship Registry Act, and, a demurrer having been filed to the bill, this Court determined, that the assignment of the vessel being invalid, the assignment of the freight was invalid also; but, on appeal, it was held, that the freight, stores, &c. were not inseparable from the vessel, and that, therefore, the plaintiff might establish a title to some part of the subject-matter assigned.

(1) 2 Myl. & Cr. 177; s.c. 6 Law J. Rep. (n.s.) Chanc. 58.

The Ship Registry Act does not, in any manner, affect the question as to the freight, and the cargo in the present case is the produce of the capital advanced by Birnie, and distinct from the ship and machinery; and the latter differs from the freight, inasmuch as freight is the hire or rent paid for the vessel. Suppose the voyage had proved unprofitable, would the defendant Horton have taken on himself the loss? Then Horton having no lien on the moiety of the cargo, how could he, as mortgagee, be entitled to claim the same, except from the time when he took possession? In this case, possession of the moiety of the vessel was never taken by Horton. There is a manifest difference between a mortgage and a sale of a ship, for a mortgagee has no right, till he enters into possession, but it is otherwise as to a purchaser; but, at all events, Horton could not consider himself the owner of the moiety of the vessel, until the bills of exchange had been paid, *i. e.* till after the month of July 1838. Before the passing of the act 6 Geo. 4. c. 110, there was no express provision made by the law, applicable to mortgages of vessels, but a party was allowed to prove, that what had been entered in the register as an actual purchase, was only a mortgage security—*Thompson v. Smith* (2). And neither that nor the subsequent act of 3 & 4 Will. 4. c. 55, anywhere requires that the defeazance in the case of a mortgage shall be entered on the register. The other cases cited on behalf of the plaintiffs, were—

Sevier v. Greenway, 19 Ves. 413.

Mestaer v. Gillespie, 11 Ibid. 626.

Douglas v. Russell, 4 Sim. 524.

Chinnery v. Blackman, 3 Doug. 391.

Case v. Davidson, 5 Mau. & Selw. 79;
s. c. 2 Brod. & Bing. 379.

Heath v. Hubbard, 4 East, 110.

Underwood v. Miller, 1 Taunt. 387.

Mr. George Turner, Mr. James Russell, and Mr. Adams, for the defendant Horton.—The argument for the plaintiffs is divisible into two parts; and they contend, first, that Horton sustains the character of a mortgagee of Birnie's moiety of the vessel, and not that of an absolute owner; secondly, that if Horton should be held to be the owner of the moiety of the ship, tackle, &c., he is not

the owner of the corresponding moiety of the cargo. The bill of sale purports, on the face of it, not to be a mortgage, and cannot be construed into one; and the transaction was treated by Horton throughout, as a conditional sale, and not as a mortgage. The cases of conditional sales and mortgages have a broad line of distinction between them, and each case must depend on its particular circumstances.

Goodman v. Grierson, 2 Ball & Bea. 275.

Tasburgh v. Ecklin, 2 Bro. P.C. 265,
Toml. edit.

If the transaction had been considered by the parties to be a mortgage, the repayment of the principal sum, and interest due thereon, at stated times, would have been formally secured, and a power of sale, and other provisions incident to mortgage transactions, would have been comprised in the assignment to Horton. There is no evidence that the transaction was not a conditional sale; and the instrument executed by Birnie to Horton does not follow the terms of the letter of the 27th of January 1837, or adopt the proposal therein contained; and the latter part of that letter furnishes the strongest evidence of the transaction being one of sale and not of mortgage. The next document relied on by the other side, is the letter of August 1837, written by Horton to Birnie's clerk Macduffie, which bears evidence of the transaction being in the nature of a conditional sale, inasmuch as it was natural and to be expected, in the case of a conditional sale, that Birnie would ask for further time to pay the bills of exchange then becoming due; and as to the acts of ownership exercised by Birnie previously to June 1838, by payments made by him to the seamen of the vessel, Birnie had credit given him for the same by Horton's clerk, on Birnie's own personal request. It is then said, the policy of the Ship Registry Act was to prevent foreigners becoming owners of British vessels; but that is a narrow view of its object, the real policy being to shut out litigation, and to render unnecessary the process by injunction in courts of equity, the proceedings in the courts of Admiralty, and actions at law for the determination of questions whether ship transactions between parties were to be considered mortgages or sales. Before the act of 6 Geo. 4. c. 110, a transaction was void, if it did not fully appear

upon the register—*Speldt v. Lechmere* (3), and this Court will not interfere against a public act of parliament, which involves a matter of public policy; and in *Davenport v. Whitmore*, the Lord Chancellor expressed no dissent from the opinion of this Court, that a trust of the ship may exist. In the present case, Horton must be considered as having been owner from the original time mentioned in the bill of sale, and all the interim profits became his, by the neglect of Birnie to take up the bills of exchange when due; and the question then is, whether Horton did not become absolute owner of Birnie's moiety of the cargo, as well as of his moiety of the ship. According to the letter of the 27th of January 1837, it is clear, the agreement was in respect of the ship and stores, and the word "appurtenances," contained in the bill of sale, will comprise the stores. In the case of the ship *Dundee* (4), stores were held to pass under the word "appurtenances;" and in *Gale v. Laurie* (5), the Court of King's Bench adopted the observations of Lord Stowell, as to the meaning of the word "appurtenances," which are found in p. 126 of the report of the case of the ship *Dundee*. But the cargo will pass by the bill of sale as an incident to the ship, *i. e.* the ship and stores being vested in Horton as the owner, the cargo subsequently acquired passes as an incident to the ship; but then it is contended on the other side, that the cargo is the result of the labour of the crew, and cannot pass as incident to the ship. If this be so, how comes it, that when a person purchases a vessel, the subsequently acquired freight passes with it?

Morrison v. Parsons, 2 Taunt. 407.

Davidson v. Case, 2 Brod. & Bing. 379.

Again, the cargo is the result of the earnings of the ship, for there could be no other freight or cargo acquired in this case, and the case of *Battersby v. Smyth* (6) shews, that the profits cannot be separated from the ship. If Horton, however, is to be considered as a mortgagee only, he is entitled, as such, to freight or cargo, which had not actually become due or been acquired, but was accruing due at the date of the transaction between

the parties; and possession having been taken by Horton of the ship and cargo on its arrival in this country, the cargo became his property.

Dean v. Magee, 4 Bing. 45; s. c. 5 Law J. Rep. C.P. 44.

Kerswell v. Bishop, 2 Cr. & Jer. 529; s. c. 1 Law J. Rep. (N.S.) Exch. 227.

Besides, the cargo was an incident of the ship, even if the transaction be decided to be a mortgage, and not an absolute purchase, and the questions here are purely of a legal character. The other cases cited for the defendant Horton, were—

Prosser v. Edmonds, 1 You. & Col. 481.

Hammond v. Messenger, 9 Sim. 327, 388; s. c. 7 Law J. Rep. (N.S.) Chanc. 310.

Mr. Rolt, for the defendant Birnie, cited *Prouting v. Hammond* (7).

THE MASTER OF THE ROLLS (after stating the facts) proceeded as follows:—The plaintiffs allege, that the bill of sale, though absolute in form, was intended to operate only by way of mortgage or security for payment of the bills which were accepted by Mr. Horton, and that the bill of sale comprised only Mr. Birnie's moiety of the ship, tackle, and appurtenances, and did not give Mr. Horton any interest whatsoever in the cargo. The defendant, Mr. Horton, by his answer, insists that a sale was intended, but that if Mr. Birnie provided cash to meet the acceptances for 4,200*l.*, he should be entitled to a retransfer of his moiety of the ship; and, on the other hand, that if Mr. Birnie should fail to provide cash to meet the acceptances when the same became due, Mr. Horton was to become absolutely entitled to Mr. Birnie's moiety of the ship, tackle, and appurtenances, including therein Mr. Birnie's moiety of the cargo of the ship. As it is admitted that the debt due from Mr. Birnie to Mr. Horton exceeds the whole value of Mr. Birnie's moiety of the ship and appurtenances, exclusively of the cargo, it is clear, if there were no questions as to the cargo, it would be immaterial to either party whether the transaction ought to be deemed a sale or mortgage, because, in either case, Mr. Horton would be entitled to the whole value of Mr. Birnie's moiety of the ship and

(7) 8 Taunt. 688.

(3) 13 Ves. 588.

(4) 1 Hagg. Adm. Rep. 121.

(5) 5 B. & C. 156; s. c. 4 Law J. Rep. K.B. 149.

(6) 3 Mad. 110.

appurtenances. I have, however, thought it right to consider what was the intention of these parties, and the nature of the contest between them, independently of the mere legal effect of the bill of sale. From the statements they respectively make, it is plain the bill of sale does not constitute, or is not evidence of, the whole contract which subsisted between them. Even the case of Horton required him to go out of the bill of sale to support his proposition. The sale was conditional, and considering the transaction which took place between Mr. Birnie and Mr. Horton from the date of Mr. Birnie's letter of the 27th of January 1837, until the time when Mr. Birnie's embarrassments became fully known, I have no doubt that the transaction was intended to be, and was by both parties understood to be, a security or mortgage, and no otherwise a sale, absolute or conditional. If the ship was intended to be Mr. Horton's, unless Mr. Birnie provided cash for the bills when at maturity, and if cash was not then provided for them, as Mr. Horton says, then according to his case, the moiety would become absolutely his, on the bills becoming due, and not being paid; but no such claim was then made by Mr. Horton. Mr. Birnie wanted cash to take up the bill, and he obtained cash upon renewed acceptances granted by Mr. Horton himself. In one view of this case, it might be considered, that Mr. Birnie having provided the cash, though with Mr. Horton's assistance, had performed the alleged condition, and so was entitled to a re-transfer of a moiety of the ship, and that the bill of sale was continued, or a re-transfer not called for, in order that there might be a security for the payment of the renewed acceptances; but there is no evidence of any new agreement, and Mr. Birnie was charged with commission, with stamps, and with the expense of renewals from time to time. The insurance was continued in his name, and he made payments and allowances to the families of the sailors, and all those acts are consistent with the notion of his being the owner, subject to a mortgage or security, but wholly inconsistent with the notion of Mr. Horton having become the owner by breach of the condition. Having regard to these circumstances, and looking at the evidence in the case, I am of opinion this was intended and understood to be not

a sale absolute or conditional, otherwise than as a sale for the purpose of mortgage or security is to be considered as a conditional sale; and even if the transaction were to be considered as a conditional sale, in the sense that the ship might be redeemed only in a limited time, and by performance of a particular condition, I am inclined to think, that by the transaction which subsequently took place between the parties, the condition ought to be considered as waived, and that Mr. Birnie was entitled to redeem, on payment of what was due on the bills.

But it was argued, whatever might be the intention of the parties, the transaction must, under the Ship Registry Act, be deemed to be an absolute sale, entitling Mr. Horton to the property as purchaser, notwithstanding any contract of his to permit Mr. Birnie to redeem, and that this Court ought not to interfere in such a case as this, nor indeed in any case, however fraudulent. The statute of 3 & 4 Will. 4. c. 55. provides, that the bill of sale of a ship, or any share thereof, after the particulars have been entered in the book of registry, shall be valid and effectual to pass the property thereby intended to be transferred against every person, and to all intents and purposes, except subsequent purchasers and mortgagees, who shall first procure an indorsement to be made on the certificate, as in the act mentioned; and further provided, that in case of mortgagees, the collector and comptroller of the port where the ship is registered shall, in the entry in the book of registry, and also on the certificate of registry, express that the transfer was made only as security, or by way of mortgage, and that in such cases, and except for certain purposes, the mortgagor, and not the mortgagee, shall be deemed to be the owner of the ship; and that the rights of the mortgagee are not to be affected by the bankruptcy of the mortgagor, notwithstanding his reputed ownership. When the transfer is not expressed to be by way of mortgage and security, the protection which the act intended to afford the mortgagee against the creditor of a bankrupt ship-owner, is not obtained, and the vendee who appears on the registry to be the owner, may be subject to all the liabilities which belong to him in that character. But it may, I think, be well doubted, whether, under the provisions of the act of par-

liament, there can be no valid mortgage in any case in which parties do not secure to themselves the protection which the statute gives, by the mode of proceeding, which is therein directed.

I do not conceive the circumstances of this case make it necessary for me to express any opinion on the subject: as I have already stated, the only question which is to be decided with a view to the relief prayed is, whether Mr. Horton has any interest in the cargo. The bill of sale purported to grant the moiety of the ship, masts, sails, tackle, apparel, boats, oars, and appurtenances. It is admitted, that independently of special contract, the sale or mortgage of a ship will carry freight, accruing due at the time of the sale, or after possession has been taken by a mortgagee; and upon the hypothesis of sale, it is argued, that by the word "appurtenances," all stores would pass, and that the ship and stores having become the property of Mr. Horton, he became entitled to the subsequently acquired cargo. It is said, in the voyages or adventures of these whale ships, the cargo constitutes the whole earnings of the ship, and that such earnings are incidental to the ship as much as freight, and that no distinction can be made between subsequently acquired cargo and subsequently earned freight. The case, upon the ship *Dundee*, upon which we have a judgment by Lord Stowell and by Lord Tenterden, has only gone to the extent of establishing that, under the act of 53 Geo. 3. c. 159, in the expression "ship and her appurtenances," the word "appurtenances" must be construed to extend to anything belonging to the owners which is on board a ship, for the accomplishment of the object of the voyage and adventure on which she is engaged; but the cargo itself is the object and purpose of the adventure, and not something provided as a means for the attainment of the object. I cannot construe the cargo as something appertaining to the ship, though it is that which the ship carried, and for the attainment of which the ship and its appurtenances were provided; and I cannot consider a cargo of this kind as freight incident to the employment of the ship, and as necessarily passing by the transfer on sale. Freight is the reward which the law gives for carrying goods; it arises on a contract for the conveyance of merchandise, and it is

said to be in its nature an entire contract, so that, as a general rule, (subject to some exceptions and to special agreement,) until the contract is completed by the delivery of the goods at the place of destination, nothing can be demanded for freight. When a ship at sea is sold, the seller is subject to an obligation, as well as entitled to a profit in respect of freight accruing due, and the duty and the profit may be well held to pass together with the ship, by means of which the duty is to be performed, and the profit to be acquired; nevertheless, the title to the freight and the title to the ship are, as I just said, often separate, and the argument founded on the analogy to the case of freight does not rest on a sure foundation. The cargo of a whale ship is an acquisition from time to time, made by the employment of the ship and of the crew; but there is nothing in the nature of a contract for the conveyance of merchandise. The employment of the ship is not governed by the contract with other persons, but subject to the directions of the owners, who may be under no obligation whatever to complete the voyage, or continue the employment of the ship any longer than suits their own convenience or interest. Supposing, that at the time of the sale, the ship was engaged on her adventures, such, if any, part of her cargo as was then acquired was already the property of the owners, and if intended to be sold, ought to be expressly named or described in the transfer, and as to such parts of the cargo which might be afterwards acquired, they were acquired under the directions and by means of the liabilities of the owners, which, as it appears to me, do not necessarily enure to the benefit of the purchaser, without an express stipulation for the purpose. Between the inconvenience of determining, in the absence of express contract, what may be due to the purchaser for the employment of the ship, in acquiring the cargo for the seller after the sale, and the inconvenience of giving to the purchaser under the description of the ship, the uncertain cargo acquired at the time of the sale, and which may be afterwards acquired, I incline to think, that the first is the least; but independently of that, it does not appear to me, that the cargo of a ship, or that which it carries, can be considered as part of, or as an incident to the ship itself; and I am

therefore of opinion, that it does not pass by an assignment of the ship and its appurtenances, without any specification of or allusion to the cargo. The plaintiffs are, therefore, entitled to the account which they ask of the moiety of the cargo, and that account must be taken.

L.C. }
 April 23 ; } NEEDHAM v. NEEDHAM.
 May 5, 7. }

Practice.—Prisoner—Act 1 Will. 4. c. 36.
s. 15, rule 5—Construction.

If the last of the thirty days mentioned in rule 5, sect. 15, of the Act 1 Will. 4. c. 36, (during which time a plaintiff is required to bring a defendant in contempt for not answering to the bar of the Court,) happens out of term, the plaintiff may bring the defendant to the bar of the Court on any day during vacation time, though prior to the expiration of the first four days of the ensuing term.

Mr. G. Richards and Mr. Calvert moved to discharge an order of the Vice Chancellor of England, by which the defendant in this case was discharged out of the custody of the warden of the Fleet.

On the 19th of January 1842, the defendant was attached, at the instance of the plaintiff, for want of answer to the plaintiff's bill, the defendant being at that time in the custody of the sheriff of Middlesex, under process issuing out of another court. On the 13th of February following, a writ of *habeas corpus cum causa* was issued, whereupon the defendant was, on the 21st of February, brought to the bar of the court, and turned over to the warden of the Fleet. On the 19th of April, by virtue of another writ of *habeas corpus*, the defendant was brought up before the Vice Chancellor of England, for the purpose of having the bill taken *pro confesso* against him, when the defendant objected that the proceedings were irregular, and that he had been brought to the bar of the Court under the first writ of *habeas corpus*, after the expiration of the period of thirty days, mentioned in the fifth rule of the act, 1 Will. 4. c. 36. s. 15, computed from the time of his attachment (the last of these days being out of term,) and before the first four days of the ensuing term; and

that the plaintiff having neglected to bring him up within the period of thirty days, the plaintiff ought not to have brought the defendant up before the first four days of the ensuing term; and his Honour being of that opinion, the plaintiff's application to have the bill taken *pro confesso* against the defendant was refused.

In support of the motion to discharge the order of the Court below, it was contended, that the plaintiff might, under the fifth rule, bring up the defendant immediately after his attachment; but, if he did not, and the last of the thirty days should fall out of term, then the defendant must be brought up to the bar of the Court, within the first days of the ensuing term, and that the words contained in the early part of the fifth rule, "and shall not have been sooner brought to the bar of the Court," meant, that in case the defendant should not be brought to the bar of the Court within the appointed period of thirty days (the last of those days happening in vacation time), then the defendant might be brought up on any day after the expiration of the period of thirty days; otherwise, if the last of those days happened on any day after the last day of Trinity term, the defendant must be kept in custody during the whole of the long vacation, and until Michaelmas term; that in *Clark v. Clarke* (1), it had been held, that the bar of the Court was considered to be at the house of the Judge, or wherever else the Court happened to be sitting. The cases of *Collins v. Collyer* (2), and *Greening v. Greening* (3), were cited in support of the application.

Mr. Wakefield, Mr. Girdlestone, and Mr. Bethell, contra.—The primary object of the 2nd, 5th, and 13th rules of 1 Will. 4. c. 36. s. 15, was to give facilities to plaintiffs to procure their bills to be taken *pro confesso*, and those rules must be construed according to their literal meaning.

[The LORD CHANCELLOR.—You must rather put a reasonable construction on the rules; for, if the fifth rule is to be taken literally, look at the consequence if, instead of

(1) Decided by the Lord Chancellor, on the 16th of April 1842, who held, that a defendant having been taken into custody under the old process of the Court, could be brought up under the provisions of the Act, 1 Will. 4. c. 36, to have the bill taken *pro confesso* against him.

(2) 1 Cr. & Ph. 262.

(3) 1 Beav. 122.

"the last day of the thirty days," the last ten days of the thirty days happen out of term.]

The construction given by Lord Cottenham to the 13th rule, which is somewhat confused, strengthens the construction that was given to the 5th rule in this case by the Court below.

[The LORD CHANCELLOR.—Mr. Richards says, the 13th rule would be inoperative in many cases, if the construction put by the Court below, in this case, on the 5th rule, were to be sustained.]

Under the 13th rule, the plaintiff need not bring the defendant to the bar of the Court, but he must take his order within the six weeks after the expiration of the two months appointed for defendant putting in his answer; and as to the words "shall not have been sooner brought to the bar of the Court," they must have reference to the bringing up of the defendant to the bar of the Court, within the period of thirty days.

HIS LORDSHIP said, he considered that the 2nd rule threw light on the construction of the 5th; that the two rules must have the same explanation given them, and that he must hold, after full consideration of the arguments, that the plaintiff may bring the defendant to the bar of the Court during vacation time, to answer his contempt for not answering the plaintiff's bill, in case the last of the thirty days happened out of term; otherwise it would follow, that a plaintiff might, under similar circumstances, detain a defendant in custody during the whole of the long vacation.

L.C. }
May 7. } WOODWARD v. CONNYBEAR.

Attachment for Want of Appearance — Commitment — Practice — Act 1 Will. 4. c. 36.

A defendant was attached for not appearing to a subpoena served on him, and he was lodged in prison, where he remained after the thirty days mentioned in the 5th rule of the Act, 1 Will. 4. c. 36. s. 15. had expired, without making any application for his discharge therefrom. An attachment was then issued against the defendant for want of an answer to the plaintiff's bill, and was served on him whilst in prison. The defendant was

brought to the bar of the Court by writ of habeas corpus cum causa, and committed to the custody of the warden of the Fleet:—Held, that the attachment and commitment of the defendant were regular.

This was an application to discharge the defendant from the custody of the warden of the Fleet, on the ground of the irregularity of the order for defendant's commitment, and of his previous attachment. The facts were as follows:—On the 5th of November 1841, the defendant was served with a subpoena to appear and answer the plaintiff's bill; on the 24th of the same month, the defendant was attached for want of an appearance to the bill, and taken to Worcester gaol; on the 27th of the same month he was served with notice, under the 11th section of the Act, 1 Will. 4. c. 36, requiring him to enter his appearance to the bill within fourteen days. On the 16th of December following, the defendant not having entered an appearance, the plaintiff obtained an order, giving plaintiff liberty to enter an appearance for the defendant; and, on the 24th of that month the plaintiff accordingly entered an appearance for the defendant. From that time to the 27th of January 1842, nothing was done, the defendant still remaining in prison: but, on that day, an attachment was lodged by the plaintiff against the defendant for want of answer; and on the 21st of February following, the defendant was brought up from Worcester gaol by a writ of *habeas corpus*, and, under the 6th rule, sworn as to his inability to put in his answer, on account of his poverty, and then turned over to the warden of the Fleet prison *cum causa*.

Vice Chancellor WIGRAM, on application made to him, had refused to discharge the defendant out of custody (1).

Mr. Girdlestone, for the defendant, the appellant, now contended, that the defendant was improperly allowed to remain in Worcester gaol, until after the time within which he ought, by virtue of the act 1 Will. 4. c. 36. s. 15. r. 5, to have been brought up to the bar of the Court, and committed: and that the continued irregular detainer in prison of the defendant, would not support

(1) 1 Hare, 297.

an attachment lodged against him whilst so imprisoned; that the 15th of January 1842 being the last of the first four days of term, on which the defendant might have been brought up by the plaintiff to the bar of the Court, he ought, on the following day, to have been discharged from prison by the gaoler, who, for the purpose of the case before the Court, was the agent of the plaintiff; that if the defendant was irregularly in the custody of the plaintiff, he could not take advantage thereof, for the purpose of procuring the defendant to be turned over to the Fleet.

[The LORD CHANCELLOR.—The plaintiff, I consider, not to have been the author of the continued custody, nor was it incumbent on him to take any steps with reference thereto.]

The plaintiff was the party who put the sheriff in motion, and the sheriff therefore must be considered as his agent. In *Lewis v. Evans* (1), the plaintiff did not enter an appearance for the defendant, but the defendant remained in custody, and he was held by the Court entitled to his discharge, and this Court will not lend its assistance to a plaintiff, if the sheriff, who is his agent, is in fault. The other cases cited were—

Hawkins v. Hall, 1 Beav. 73; 4 Myl. & Cr. 280; s. c. 8 Law J. Rep. (n.s.) Chanc. 225.

Hutchins v. Kenrick, 2 Burr. 1048.

Mr. J. Bailey, for the plaintiff, was not heard by the Court.

The LORD CHANCELLOR.—In the case of *Lewis v. Evans*, the plaintiff was actor, and the defendant did not make any application for his discharge; indeed, the plaintiff was the actor throughout, by bringing the defendant up to the bar of the Court, when the irregular order was made; afterwards the defendant, on his own application, was discharged by the Court. The case of *Lewis v. Evans*, therefore, does not at all touch the case before me, where the plaintiff was not an acting party, and was not bound to do anything. The order of the Court below must therefore be affirmed.

(1) 2 Cr. & Ph. 264; s. c. 10 Law J. Rep. (n.s.) Chanc. 325.

WIGRAM, V.C. { DYSON v. MORRIS.
Feb. 14, 23. { DYSON v. TAYLOR.

Parties—Appearance at the Hearing—Supplemental Bill—Foreclosure—Sale.

A person who has been named as a party to a bill, but has not appeared, or been served with a subpoena, may, with the plaintiff's consent, appear at the hearing, and be bound by the decree. But where he is not named as party, he will not be allowed to appear at the hearing for that purpose, except with the consent of all parties to the suit.

Semble—The cases in which the parties to the original bill are necessary parties to a supplemental bill, are those where the interests of the defendants require such new parties to be before the Court; the cases where they are not necessary parties, are those in which such new defendants are brought before the Court in respect of the plaintiff's interest.

Allegation in a bill, that A, B, and C. were named executors in the will of D, and that A. and C. duly proved the will, and thereby became his legal personal representatives:—Held, that this allegation, supported by the probate copy of the will, was sufficient evidence to throw on the defendant the onus of shewing that the other executor did prove.

A. mortgaged lands to B, and by the same deed, as a further security, assigned to B. a policy of assurance on his life, and all his right, title, and interest therein, upon trust that B. should receive the money to become payable thereunder, and apply the same in discharge of the mortgage debt, and, subject thereto, in trust for A. The deed contained the usual covenant to pay the mortgage debt:—Held, that B. was not entitled to a sale of the policy, but only to a foreclosure of the lands, retaining the policy for what it was worth. Secus, if it had been a simple assignment of the policy as a security, without any declaration of trust.

By the deed of the 11th of February 1819, the defendant Morris, in consideration of 5,000*l.* then advanced, appointed certain lands to the plaintiff Dyson, for a term of 1,000 years, subject to redemption, on payment of the 5,000*l.* and interest. And by deed of the 16th of January 1823, reciting that the lands comprised in the present deed were subject to a mortgage term of 1,000 years, for securing 1,000*l.* and interest to

Bridgman, and that Dyson had agreed to pay off Bridgman's mortgage, and reciting an agreement that both premises were to be a security for the 5,000*l.* and 1,000*l.*, Bridgman and Morris, in consideration of 1,000*l.* paid to Bridgman, bargained and sold to Edgar Taylor, his executors, &c. the premises comprised in Bridgman's mortgage, to hold to Edgar Taylor for the residue of the term of 1,000 years, in trust for Dyson, subject to redemption, on payment by Morris of 6,000*l.* and interest; and Morris covenanted with Dyson, that the premises comprised in the deed of 1819, should be a security for the 1,000*l.* as well as the 5,000*l.*, and that neither estate should be redeemable without payment of the 6,000*l.* and interest: and further reciting, that two several terms of 600 years and 1,000 years, in these second premises, had been assigned respectively to Dyson and Harry Browne: it was declared that Dyson and Harry Browne should hold the same respectively, upon trust, in the first place, to secure the 6,000*l.* and interest, and, subject thereto, for Morris. The bill then stated an application by Morris to Dyson for a further advance of 3,350*l.*, to be secured by a charge upon the aforesaid premises, and by an assignment of a policy of assurance on the life of Morris; and that by a deed of the 6th of April 1826, reciting the agreement and the advance, and that the policy had been effected, Morris covenanted with Dyson, that the whole of the premises should be charged with 3,350*l.* and interest, and that no part of the same should be redeemable till payment of the 3,350*l.* and 6,000*l.* and interest; and as a further security for the said sums and interest, Morris assigned to Dyson, his executors, &c., all that the said instrument or policy of assurance, and all sum and sums of money which should become payable under or by virtue of the same, and all benefit and advantage to be had or derived therefrom; and all the right, title, interest, property, claim, and demand whatsoever of him, the said Morris, of, in, to, or out of the same, and every part thereof, to have, hold, receive, take, and enjoy the policy and money, and all other the premises thereby assigned unto and by Dyson, his executors, &c., from thenceforth absolutely; and with full power and authority to and for Dyson to ask, demand, sue for, recover, and receive the

monies which should become payable under or by virtue of the said policy, and to give effectual discharges, &c., and to enforce, have, receive, and take the full benefit thereof; but, nevertheless, upon the trusts thereafter declared concerning the same, that is to say, upon trust, that Dyson should recover, receive, and obtain the payment of the said sum and sums of money which should become payable under or by virtue of the said policy, when and as the same respectively should become due and payable, and should, in the first place, apply the same in payment of the expenses, and in the next place in payment of the said sums of 6,000*l.* and 3,350*l.*, and subject thereto, in trust for Morris, his executors, administrators, and assigns; and Morris thereby covenanted with Dyson to pay the said sum of 3,350*l.* with interest, on the 6th of October then next ensuing. And it was declared, that Edgar Taylor, Thomas Dyson, and Harry Browne should stand possessed of the residue of the terms of 1,000 years, 600 years, and 1,000 years, in trust for better securing to Dyson the two several sums of 6,000*l.* and 3,350*l.* with interest, and subject thereto, in trust for Morris. The allegations of the bill as to the parties interested in the mortgage monies and terms assigned, and as to the representations of those who were dead, will be found fully stated in the judgment. The bill, after charging that the premises were a scanty security for 9,350*l.*, and offering to consent to a sale if the Court should think fit, prayed an account of what was due to the plaintiff upon his said securities, for principal and interest, and that Morris might be decreed to pay to the plaintiff what should be found due upon such account by a short day, together with costs, &c., or in default thereof, that the said policy might be sold, and that the money arising from such sale might be applied in satisfaction of what might be found due to the plaintiff on such account; in case of a deficiency, that Morris might be ordered to pay what should remain due to the plaintiff, upon a day to be appointed, &c.; and that in default thereof, Morris, and all persons claiming under him, might be foreclosed, &c. And that Dyson and Henry Browne, and M. A. Browne, might be respectively decreed to stand possessed of the said terms of 600 years and 1,000 years, in trust only

for Dyson. And in case the Court should be of opinion that the said mortgaged premises, or a competent part thereof, might be sold, then that the same might be sold, and the proceeds applied in satisfaction of the plaintiff's debt, &c.

Edgar Taylor, the trustee of the term in the deed of January 1823, was made a co-plaintiff in the original bill, but upon his death, his name was struck out by amendment; and his representatives were brought before the Court by supplemental bill, to which none of the other defendants were made parties. The original and supplemental suit now came on to be heard together.

A preliminary objection was taken on the part of the defendant Morris, that three persons were named as executors of Harry Browne, and only two were alleged to have proved, and that it was not alleged that the third, who was no party to the record, had renounced.

WIGRAM, V.C. thought that the allegation was sufficient, to throw the onus of proving the contrary on the objecting party, especially as the probate of the will was in evidence.

Mr. Sutton Sharpe and *Mr. Rolt*, for the plaintiff.—It is not necessary to make the defendants to the original bill parties to the supplemental bill, which was rendered necessary merely for the conveyance.

Munch v. Cockerell, 8 Sim. 219; s. c. 6 Law J. Rep. (n.s.) Chanc. 9.

Greenwood v. Atkinson, 5 Sim. 419.

In *Feary v. Stephenson* (1), the objection was allowed, the Master of the Rolls saying there was no authority for it in that case.

Mr. Temple and *Mr. E. V. Sidebottom*, for the defendant Morris.—The mortgagor, at least, ought to be a defendant to the supplemental bill—*Feary v. Stephenson*. The policy, according to the trusts of the deed, is not the subject of sale. If the plaintiff chooses to foreclose the mortgage, he must give up the policy. The mortgagor is to be allowed six months time to redeem the policy.

Parker v. Housefield, 2 Myl. & K. 419; s. c. 4 Law J. Rep. (n.s.) Chanc. 57.

Meller v. Woods, 1 Keen, 16; s. c. 5 Law J. Rep. (n.s.) Chanc. 109.

(1) 1 Beav. 42.

Thorpe v. Gartside, 2 You. & Col. 730; s. c. 7 Law J. Rep. (n.s.) Ex. Eq. 30.
Seton, 180.

H. Browne's executors were not necessary parties to the suit, as the bill states that he released all his interest to Dyson and Taylor.

Mr. Sutton Sharpe, in reply.

Feb. 23.—WIGRAM, V.C., (after stating the different deeds and transactions,) proceeded as follows:—Dropping for the moment the other parties to this suit, the bill is filed against Morris, praying a sale of the policy, &c.; and the bill states, that Meadows Taylor and Harry Browne, who are both dead, were interested jointly with the plaintiff in the whole of the mortgage monies; and the bill then contains this statement, upon which a question arises as to costs only: "That the partnership between the plaintiffs, Meadows Taylor and Harry Browne, ceased in December 1830, upon the retirement of Harry Browne, and that it was thereupon arranged, that the said securities should belong to the plaintiff and Meadows Taylor; and that, accordingly, Harry Browne assigned to them all his interest in the securities, and the sums due thereon;" a statement which, if true, would wholly divest Harry Browne's estate of any interest in the mortgage monies. It then states, that Harry Browne died in March 1839, and by his will appointed his son Henry Browne (a defendant), his brother Edgar Browne, and his wife Mary Ann Browne (a defendant), executors and executrix, and that his will was duly proved by Henry Browne and Mary Ann Browne, and that they thereupon became and still are the legal personal representatives of Harry Browne. The bill then states, that Dyson and Meadows Taylor carried on business in partnership, under the firm of Taylor & Dyson, from the retirement of Harry Browne to the death of Meadows Taylor, which took place in March 1838; and that it was agreed, that the securities and monies due thereon should form part of the capital of such firm; that Meadows Taylor, by his will, appointed his wife, Elizabeth Taylor, Thomas Dyson, and his sons, Meadows Taylor and T. L. Taylor, executrix and executors;—that the will was duly proved by Dyson and T. L. Taylor, and that they thereupon became and still are his sole personal representatives.

These allegations, as to the representatives, are open to the same observation, that several persons are alleged to have been appointed executors, and two only are alleged to have proved, the other not being alleged to have renounced; and these two alone are made parties to the record. Then follows this allegation, that upon the death of Meadows Taylor, the plaintiff alone became interested in the securities and the monies due thereon, and still continues so entitled. According to that allegation, which, as against the plaintiff, I must take to be true, the estate of Meadows Taylor has no interest whatever in the property in question.

Now, in this state of things, the original bill is filed by Thomas Dyson, the mortgagee, praying, &c., (*supra*). The defendants to the bill are T. B. Morris, (the mortgagor,) Henry Browne and Mary Ann Browne, alleged, in the bill, to be the personal representatives of Harry Browne, and T. L. Taylor, who, with the plaintiff, is alleged to be the personal representative of Meadows Taylor; and H. Browne is made a party to the bill in another character also, that is, as tennor of a term of 1,000 years, which constitutes part of the plaintiff's security;—Edgar Taylor, in whom another term of years was vested, is dead, and his personal representatives are not made parties to the original bill; but it is admitted by the plaintiff, that it is necessary that such personal representatives should be before the Court, in order to entitle the plaintiff to the relief he asks. The supplemental bill is filed against the personal representatives of Edgar Taylor, and against no other parties, for the purpose of supplying this defect. The first objection taken on the part of the defendant, was founded upon the state of the pleadings I have adverted to; and it was said, that the defect in the original bill, in not having made Edgar Taylor's representatives parties thereto, was not cured by a supplemental bill against the executors of Edgar Taylor only; but that the mortgagor at least was a necessary party to such supplemental bill. In the course of the argument it was suggested, that if the executors of Edgar Taylor would, with the plaintiff's consent, appear and submit to be bound by the decree in the original cause, the defect arising from the want of parties would thereby be cured, and the objec-

tion taken to the frame of the supplemental bill, would resolve itself into a question of costs alone; to this suggestion I was at the time inclined to assent, but having since had an opportunity of referring to the authorities, I doubt whether that course would be strictly regular. The practice, in this respect, as I collect it from the decided cases, appears to be, that if a person is named as a party to a bill, and has not appeared or been served with a subpoena to appear, the Court will with the plaintiff's consent, permit such party to appear at the hearing, and become a party to the decree, by submitting to be bound by it—*Capel v. Butler* (2), *Banister v. Way* (3); and *The Attorney General v. Pearson* (4), so far as the dictum goes, is an authority for the same proposition; but where the party, who appears at the hearing, and offers to be bound by the decree, is not named as a party to the bill, the Court will not, unless with the consent of all the parties to the suit, permit him to become a party to the decree—*Bozon v. Bolland* (5), and *The Attorney General v. Pearson*. It does not appear, from the report of the case of *White v. Hall* (6), what the state of the record in that case was; but that case is clearly distinguishable from the present; and although the practice has, as I am informed, been relaxed in some late cases, I am satisfied that the cases I have cited correctly represent the practice of the Court. My reason for going into that point is, that since I suggested in this case that a party submitting might be made a party to the decree, I have twice been asked to follow the same course, where it was opposed, and as parties appear to have been misled by that suggestion, I thought it right, having looked into the authorities, to correct my own impression. The question then is, whether the supplemental bill is defective, by reason of the mortgagor not being made a party to it. I think it right to guard my judgment upon this part of the case, by stating, that in the conclusion to which I have come, I do not mean to decide any general proposition, with respect to the

(2) 2 Sim. & Stu. 457; s. c. 4 Law J. Rep. Chanc. 69.

(3) 2 Dick. 686.

(4) 7 Sim. 302.

(5) 1 Russ. & Myl. 69.

(6) Ibid. 332.

cases which require that the defendants to an original bill should be parties to a supplemental bill. If compelled, which I am not, to express my opinion, I should rather incline to say, that the cases in which the parties to the original bill were necessary parties to such a supplemental bill, were those in which the interests of the defendants required that such new parties should be before the Court; and that the cases in which the parties to the original bill are not necessary parties to such supplemental bill, were those in which the new party is brought before the Court, in respect of the plaintiff's interest only. It is sufficient, however, in this case to say, that the decision in *Greenwood v. Atkinson*, which was come to after argument, was followed by *The Attorney General v. Pearson* and *Semple v. Price* (7), and was not disapproved of by Lord Langdale, in *Feary v. Stephenson*. Upon these cases I observe only, that the practice established by them cannot possibly work injustice, in cases like this before me. The original and supplemental causes may be heard together. The mortgagor has a right to insist that the decree shall provide for a reconveyance of the real estate, upon payment of the mortgage-money; and it is only for the purpose of such reconveyance that the executors of Edgar Taylor are necessary parties. If the supplemental bill do not enable the Court to make such a decree as the mortgagor is entitled to, the plaintiff will not succeed; and if the supplemental bill do enable the Court to make such a decree, he is not hurt by the form of the record. In this case, the executors of Edgar Taylor are willing to do all which the exigencies of the case may require, and the objection, except as to matter of form, must wholly fail.

Another objection taken was, that it did not appear that the estate of Harry Browne and Meadows Taylor were truly represented upon the record. The bill alleged, that Harry Browne appointed three persons executors; and alleged affirmatively, that two of them proved his will, and did not allege that the third person named executor did not prove, and the two who are so alleged to have proved are alone made parties to the bill, which alleges, that they are the legal personal representatives of Edgar Taylor,

(7) 10 Sim. 238; s. c. 8 Law J. Rep. (N.S.) Chanc. 366.

deceased. The objection as to the representatives of Meadows Taylor, is of the same description. I see no reason for altering the opinion I expressed at the hearing, as to this objection. If the bill had in terms alleged, that the persons who, in each case, are said to have proved the wills respectively, had alone proved, then the production of the probate in each case would have supported the allegation. I think, the allegation as it stands is sufficient to let in the same proof, and that the same proof is sufficient, especially where the truth of the case might so easily be ascertained, and it is not suggested that the facts are otherwise than the bill suggests. I come, therefore, to the substantial question in the cause, which relates only to the decree to be made in respect of the policy, a question about which I have felt the greatest difficulty, and respecting which I think it right, therefore, fully to explain the grounds of my judgment.

Looking at the real estate alone, there is no question, but that the decree would be the ordinary decree in a foreclosure suit. Again, if the subject of the suit were stock or personal chattels alone, the decree would be equally matter of course. There can be no doubt but that in the case of a mortgage of stock—vide the cases collected in *Cooté on Mortgages*, p. 362, *Powell on Mortgages*, by *Coventry*, p. 962, and, in the case of a mortgage of personal chattels, *Kemp v. Westbrooke* (8)—the remedy of the mortgagee would be by sale; and I apprehend that a right to the same kind of relief would exist in equity, in the case of a simple assignment of a policy of insurance. Again, in the case of a mortgagee whose security was composed both of land and of stock, or personal chattels, or a policy simply assigned as a security, I should probably experience little difficulty as to the decree to which the mortgagee would be entitled. In the case of securities so constituted, the course usually recommended to a mortgagee, and pursued out of court, is first to realize his collateral securities, and then to proceed to foreclose the mortgage for so much of the debt as the collateral securities may not be sufficient to satisfy. A decree in that form would therefore follow the course usually pursued out of court, and is the form of decree which

(8) Belt's Supp. to Ves. sen. 141.

the justice of the case manifestly requires. It is only by first realizing his collateral securities, and afterwards proceeding to foreclose the mortgage, that a mortgagee can get a valid decree for foreclosure without losing the benefit of his collateral securities, which he cannot, as a matter of course, be called upon to do. The difficulty I have experienced has been in applying the preceding principles to the particular case before me, and this difficulty arises from the particular form of the instrument of assignment in this case. By that assignment, the policy itself, and the monies to be received under it, are assigned to the plaintiff absolutely, in the largest possible terms, but upon trust to receive the monies to become due and payable under the policy. No power of sale, however, is contained in the assignment; and the mortgagor contends, that however large may be the terms of the assignment, the trust declared upon it is the true measure of the mortgagee's interest in it in this court, in which alone the assignment is operative. The mortgagor contends, in effect, that the mortgagee has a right to make the policy available in the manner and form pointed out by the trust, and not otherwise; and that the terms of the trust limit his interest to a right to receive the monies after the death of the assured, excluding a right to have the policy sold in his lifetime; and if the assignment of the policy stood alone, it would perhaps be difficult to deny the force of this argument. But in determining the effect to be given to this assignment, not standing alone, but in conjunction with a mortgage of land, which carries with it a certain well-defined right, namely, a right to foreclose, the first observation that arises is this, that unless the policy is now to be sold, it is impossible for the plaintiff to obtain a valid decree of foreclosure, without giving up the benefit of the policy. If the policy is not now to be sold, the plaintiff must either give up his right to a valid decree of foreclosure, or give up the policy. One test, therefore, by which the rights of the parties may safely be tried, is by ascertaining whether, according to the true construction of the deed of the 6th of April 1826, it was not intended that the plaintiff should have a right immediately, or at any time, to recover and enforce payment of his debt, without abandoning the security,

or any part of the securities, he held for that debt at the time the policy was assigned. Now, there are certainly strong grounds for contending, that the deed of April 1826, with the exception of the trust as to the policy, shews, that this was the intention of the parties. At the time of executing that deed, the mortgagee had an undoubted right to foreclose his existing mortgages. The deed recites an agreement by the plaintiff to make a further advance of 3,350*l.*, upon the terms of having the same secured, first, by a further charge upon the lands; and secondly, by an assignment of the policy, and of the monies which should become payable under or by virtue of the same. The deed then creates a further charge upon the lands, and declares that the lands shall not be redeemed or redeemable without payment of the whole mortgage debt; the mortgagor assigns the policy, and covenants to pay the money then advanced. There is much difficulty in spelling out of this transaction an intention on the part of the mortgagee to forego his right to foreclosure during the whole life of the mortgagor, for to that length the argument must go, except at the expense of giving up the benefit of the policy, or of having, as it may be, the foreclosure opened if he shall assert his right to the benefit of the policy after the death of the mortgagor. The covenant, to repay the advance of the 3,350*l.*, made at the time of the assignment, is evidence that the parties intended that the mortgagee should be entitled to enforce payment of his debt at any time after the loan, and the proviso, that the land shall not be redeemed or redeemable, at law or in equity, until payment of the entire mortgage debt of 9,350*l.* is contemporaneous evidence, that the mortgagee was to retain his existing mortgage security, accompanied by the transaction of April 1826. In the absence of express words to shew it, I have great difficulty in believing that it could have been intended that any part of the security, which the plaintiff had at the time of executing the deed of April 1826, should be forfeited or impaired by enforcing payment of his debt during the life of the mortgagor; nor am I prepared fully to admit that the trusts declared concerning the policy are such as necessarily and incontrovertibly to countervail the obvious effect of the deed in all other respects. If the trusts

had been omitted, the mortgagee would, in my view of the case, have a right, at his own election, in default of payment of the mortgage debt, to have had the policy sold in the lifetime of the assured, or to have received the money, payable by virtue of the policy, after his death. The trust declared in this case, is confined in terms to the latter of these rights; and, as I have already said, if the deed of April 1826 had been confined to the policy, I am far from saying that conclusive weight might not be due to the argument, which requires me to hold, that the expression of that trust excludes the right to sell the policy; but such an implication, when its effect upon the plaintiff's right of redemption is considered, is not by any means conclusive. I may observe, also, though I do not lay stress upon the circumstance, that in the concluding part of the deed, in which the mortgagor appoints a term of years to secure the advance of the 3,350*l.*, the trusts are in the same form as those declared of the policy, namely, "in the first place, for the better and more effectually securing to the plaintiff, as well the sum of 3,350*l.* as of the sum of 6,000*l.* before advanced, and, subject thereto, upon trust for the mortgagor." But no one could seriously contend, that the ultimate declaration of trust, in favour of the mortgagor, would oblige the mortgagee to retain the lands comprised in the term in specie, if the nature of his security, in other respects, were such as to entitle him to a sale. Now, in this conflict of evidence, which the deed of April 1826 itself raises, as to the real intention of the parties, I have thought it safest, though after very great doubt, to inquire, whether, construing the deed according to the letter, the mortgagee could, in any possible state of circumstances, have had the full benefit of his securities, in the specific manner most beneficial to him. Now, if the mortgagor had died at any time before the bill was filed, or even before decree, the mortgagee would have had the full benefit of his securities in the specific manner most beneficial to him. He might, in that case, have applied the proceeds of the policy in reduction of his debt, and taken a foreclosure for so much of his debt as the proceeds of the policy would not satisfy.

Finding, then, that the deed, construed according to its letter, might, in one state

of circumstances have had a sensible operation, I have thought it safer to abide by the letter of the deed, in this conflict of evidence, than to act upon the conviction to which that letter is certainly opposed, that the deed of April 1826 has been unintentionally so framed as to defeat the real intention of the parties. It was then argued, for the mortgagor, that the mortgagee, taking a decree of foreclosure, must give up the policy to the mortgagor. This claim I have no hesitation in rejecting. A mortgagee, foreclosing a mortgage, is never called upon to give up his bond, or release the covenant of the mortgagor, or to give up any collateral security he may hold. It would manifestly be unjust that he should be compelled to do so. The estate, which is his at law, may not be worth half the money charged upon it, and the mortgagor, by keeping faith with the mortgagee in paying the mortgage debt, may ward off the foreclosure; nor can any injury be done to the mortgagor by the mortgagee retaining his collateral securities, because, if the estate, in fact, should be worth more than the mortgage money, a court of equity would open the foreclosure, if the collateral securities should be put in suit, and the justice of the case require it—*Perry v. Barker* (9). I think the plaintiff, in this case must take the usual decree of foreclosure, retaining the policy for what it may be worth hereafter. With respect to the costs, as the executors of H. Browne are parties to the cause in the character of termor, and in that character, necessary parties to the suit, I can make no special order as to their costs. With respect to the costs of the executors of Meadows Taylor, I think the plaintiff must pay those costs; and looking at the statement in the bill, I cannot understand why they were originally made parties, or why the bill should not have been dismissed against them; for, besides the allegation in the bill, they have disclaimed upon the record. I think the plaintiff must also pay the costs of the supplemental suit up to and including the filing of the supplemental bill. The costs of the answer to that bill, and the costs of the defendants to it appearing at the hearing, would equally have been occasioned, if Edgar Taylor had been made a party to the original bill.

(9) 8 Ves. 527; s. c. 13 Ves. 198.

V.C. }
Mar. 19. } TRAIL v. KIBBLEWHITE.

Practice.—46th Order of August 1841.

This case came on for further directions.

Mr. Chapman appeared for the plaintiff.

Mr. Chandless for a creditor, who had carried in his claim before the Master, under a decree in the suit previous to the date of the Orders of 1841, but who had not established that claim till after the passing of the orders, claimed interest at 4l. per cent. under the 46th Order (1), and urged, that this construction ought to be put upon the order, since it was plain the creditor might otherwise have easily brought himself within the order, by merely withdrawing his claim, and making it again after the passing of the orders. It must be quite sufficient, so long as the debt was established after the date of the orders.

Mr. F. Bayley, contra, for the person entitled in remainder.

The VICE CHANCELLOR said, he could not allow the claim of the creditor: the effect would, in such a case, be to read the order, "who shall come in or establish" his debt, instead of "and." A party, to entitle himself to interest under that order, must sustain the double character of having come in, and established his debt.

L.C. }
May 7. } In re BLAKE.

Bankrupt—Special Case—Costs.

Where commissioners of bankrupt refuse to receive a creditor's deposition in proof of his debt, and their decision is affirmed by the Court of Review, but the judgment of the Court of Review is reversed by the Lord

(1) The 46th Order of August 1841, directs, "That a creditor, whose debt does not carry interest, who shall come in and establish the same before the Master, under a decree or order in the suit, shall be entitled to interest upon his debt, at the rate of 4l. per cent., from the date of the decree, out of any assets which may remain after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest."

Chancellor, the creditor must bear his own costs, and the costs of the assignees will be directed to come out of the estate.

For the facts and judgment on the special case, *vide supra*, p. 180.

The country commissioners had refused to receive the petitioners' deposition in proof of their debt, and the Court of Review, after full argument affirmed their decision, but the Lord Chancellor reversed the judgment of the Court of Review; and the question was, how the different costs incurred were to be borne.

Mr. Girdlestone, for the petitioners, cited—*Archbold's Bankruptcy*, p. 433, ed. 1837.
Ex parte Hooper, 1 Mont. & Ayr. 403;
s. c. 3 Law J. Rep. (N.S.) Bankr. 38.
Ex parte Millington, 3 Dea. & Ch. 309.
Ex parte Fiske, Mont. & M'Ar. 93.

Mr. Bethell, contra, for the assignees.

The LORD CHANCELLOR decided, that the petitioners must bear their own costs, but the costs of the assignees must come out of the bankrupt's estate.

WIGRAM, V.C. }
May 25. } COLLINS v. BROWN.

Practice.—8th Order of August 1841.

The 8th Order of August 1841, does not take away the right of the plaintiff to sue out an attachment for want of appearance.

Mr. Cameron moved for a *habeas corpus* to bring up the defendant, who had been attached for want of appearance. It was suggested, on a previous application, that the Master of the Rolls had expressed an opinion, that the 8th New Order had done away with the old practice in this respect.

WIGRAM, V.C.—It is quite clear, that that order leaves the plaintiff at liberty to enforce an appearance by attachment, if he thinks fit. I have ascertained that there is no foundation for the suggestion, that the Master of the Rolls holds a contrary opinion.

Application granted.

V.C.
Feb. 16; Mar. 1, 10; } BRYDGES v. BRANFIL.
April 16.

Partners, Liability of—Solicitor—Practice.

A testator devises estates to two for life successively, with remainders over. The first tenant for life being in difficulties enters into a fraudulent arrangement to sell part of the estates at a low rate, and re-purchase at a most exorbitant increase of price; being assisted by his solicitor, whose partners assent to his proceedings in ignorance of their nature. The Master is deceived, the sale completed, and the purchase-money paid out of court. The first tenant for life dies, leaving a will and two executors, being at his death committee of the second tenant for life, who was lunatic. Upon a bill being filed by one in remainder, who had become committee of such lunatic, against the solicitors employed by the first tenant for life, and all other parties to the fraud, praying the payment back into court of the purchase-money for the estates, or so much as constituted the difference between that sum and their real value:—Held, that it being impossible for the Court to distinguish one solicitor from his partners, the act of the firm being the act of every one of them, they were, with the other parties to the fraud, jointly and severally liable for so much of the purchase-money as was not applied lawfully.

A testator dies, having appointed two executors, one of whom dies before answer, having possessed assets and proved; the surviving executor answers bill of revivor and supplement: objected, that he should have answered original bill:—Held, first, that the defendant to a bill being so in every character which the bill shews he bears, and this defendant having, in fact, answered the original bill, the objection must be overruled; secondly, that the personal representative of the deceased executor, who had possessed assets, must be before the Court—order to amend accordingly.

Thomas Barret, by his will, dated the 21st of September 1796, devised and bequeathed his mansion at Lee, in Kent, together with several valuable freeholds and a leasehold mill in Kent and Surrey, to two trustees, upon trust, for the late Colonel

Barret, then Mr. Brydges (who assumed the testator's name), for life, and after his death to his brother, Sir John William Egerton Brydges, for life, and on his death, without issue, the estates were limited to his three sisters, Mrs. Holmes, Mrs. Quillinan, and Mrs. Swann. The testator died in January 1803, and the will was proved by the trustees, who were also executors. In 1810, Colonel Barret attained twenty-one, and took possession of the property. He became subsequently much embarrassed by assisting his father, Sir Samuel E. Brydges, in parliamentary and legal expenses, and in 1822, having devised a scheme for relieving himself therefrom, filed a bill for appointing other trustees in the room of those acting under Thomas Barret's will, and by an order obtained in April following, Edward C. Branfil and the Rev. A. E. Brydges were appointed such trustees. On the 24th of June, in the same year, Colonel Barret obtained an act of parliament for selling the lands distant from the mansion at Lee, and purchasing with the proceeds other lands contiguous thereto, to be settled to the same uses; his plan being to sell the devised estates, to purchase with the proceeds lands of his own and his father's, at an extravagant price, and pocket the difference. The trust estates produced 30,745*l.* 18*s.*, and three sales of land belonging to himself and his father, Sir Samuel E. Brydges, were effected, the first two to an amount three times their intrinsic value, and the third, which took place in January 1830, became the subject of the present suit, and was effected in the following manner. In July 1829, Colonel Barret and his father being possessed of certain lands in the vicinity of the mansion at Lee, which were mortgaged to a Mr. Shepherd, a Mr. Crozier, and a Mrs. Whitby, and generally charged with incumbrances, entered into a pretended agreement with Lieut. Quillinan (Sir Samuel E. Brydges's son-in-law), for the sale of them to him, for 7,596*l.* The conveyance was executed on the 29th of December following, and the charges to Messrs. Shepherd and Crozier, and Mrs. Whitby paid off to that amount, 3,000*l.* to the latter, and the residue to the two former; but Mrs. Whitby did not execute till the 29th of January 1830. In the month of December 1829, a state of facts and proposal were carried to the Master in

the trustees' names, reciting an order of the Court, dated the 13th of February 1827, on petition, authorizing them, and stating, that being anxious to invest the sum of 22,600*l.*, part of the proceeds of the trust estates, in other lands, lying near to the mansion at Lee, they had applied to Mr. Quillinan to sell them certain lands lying near, and very desirable to be held with the said mansion, which he had agreed to, for the said sum of 22,600*l.* (being the same lands he had just purchased of his father-in-law for 7,596*l.*) The state of facts was supported by affidavits, by Robert Westfield, a farmer, stating 22,600*l.* to be the value of the lands, and by Colonel Barret in support of Westfield's competency as a land-surveyor. Three abstracts of title were made out, but the deed of December 1829, was very imperfectly abstracted; the consideration money being only stated in one, and referred to in the other two. These abstracts were made out by Mr. Josiah Wathen, conveyancing clerk to Messrs. Brooks, Grane, & Cooper, Col. Barret's solicitors, who had conducted business for him from the commencement, up to the year 1825, under the title of Messrs. Brooks & Grane, and since that time as Messrs. Brooks, Grane, & Cooper, Mr. Cooper having been then taken into partnership. An affidavit appeared, made by Mr. Wathen, now a solicitor, swearing that, upon comparison, the abstracts were true and faithful extracts of the deeds.

The title was approved by the Master on the 8th of January 1830, the purchase was ordered by the Court on the 12th, and a reference to settle the conveyance directed. The conveyance was settled, the purchase-money paid out of court, and Mr. Brooks, under a power of attorney, received it, and handed in a cash account to Colonel Barret, who, with his father, gave a bond and other securities for the money he owed the firm of Brooks, Grane, & Cooper. Mrs. Whitby, and Messrs. Shepherd and Crozier, upon discovering that this sale had been effected, and suspecting that the sale to Lieutenant Quillinan had been made with the view of defrauding them, filed two bills, praying for the payment of the residue of their mortgage debts out of the 22,600*l.*, the purchase-money of Quillinan's estates. Mr. Branfil, the co-trustee of the Rev. A. Brydges, now became aware of and alarmed

at his situation, and presented a petition to the Lord Chancellor, stating all the circumstances of the last sale, stating that the Master had been deceived, and praying that Messrs. Brooks, Grane, & Cooper might be ordered to pay the said sum of 22,600*l.* into court, with interest from the time it was paid out. A long correspondence took place between the respective solicitors, but nothing was done further till 1833, when a collusive order of reference was taken, to inquire what was the real value of the lands in question at the time of the sale, and if they should be found of less value than the sum given, the difference might be paid to Col. Barret. On the 25th of November 1833, Messrs. Brooks, Grane, & Cooper also executed a deed of indemnity to Mr. Branfil, securing any amount which might constitute the difference between the actual purchase-money and the value of the estates, not admitting at the same time any liability on their parts; it also stated the payments made to the mortgagees of Sir Samuel E. Brydges, and that they had abandoned their legal proceedings, and assigned their securities to Messrs. Brooks, Grane, & Cooper. In June 1834, Colonel Barret died in indigent circumstances, near Boulogne-sur-Mer, having made his will, and appointed Anthony Rokeby Brydges and Anthony Egerton Brydges, his executors. At the time of his death he was committee of his brother, Sir J. W. E. Brydges, a lunatic (who became tenant for life), and was succeeded by Mr. Frederick Dashwood Swann, his brother-in-law, as such committee, who presented a petition to inquire into the application of the trust monies, and especially the said sum of 22,600*l.* A reference to Lord Henley was ordered, who directed a bill to be filed, and the present suit was then instituted. The bill stated the sale by Lieut. Quillinan, and prayed that the parties implicated in the fraud might be decreed to pay the said sum of 22,600*l.* into court, or if not, so much as constituted the difference between that sum and the real value of the estates, purchased by the trustees for that sum.

At the hearing, the following preliminary objection was taken. The bill stated the death of Colonel Barret in 1834, his appointment of two executors, Anthony Rokeby Brydges and Anthony Egerton Brydges, and that A. Rokeby Brydges alone proved

the will, and that he had possessed himself of personal estate and effects of Col. Barret, and was his sole legal personal representative. A. Rokeby Brydges died before answer. A. Egerton Brydges, in answer to the original bill, said he was the sole surviving executor of the said Col. Barret, but that he had not yet proved the will. Shortly afterwards he did prove the will, and a bill of revivor and supplement was filed, stating the death of A. Rokeby Brydges, that he (A. R. B.) had not, to the best of plaintiff's belief and information, possessed himself of any assets of the testator; and prayed that Anthony Egerton might answer the bill of revivor and supplement.

Mr. Walker, Mr. Parry, Mr. Craig, Mr. Richards, and Mr. Romilly, objected, that A. Egerton should have been made to answer the original bill as well. So far as concerns Col. Barret's estate, A. Egerton Brydges was not before the Court. He was before the Court only in character of a trustee, charged with a breach of trust; and an answer put in by him in such a character might be framed in a totally different manner from that of an executor against whose testator fraud was imputed. There was no issue, in the present state of the record, between the plaintiff's and Col. Barret's estate; for the latter was not represented before the Court, and without this the estate of Col. Barret could not be charged.

THE VICE CHANCELLOR.—My opinion is, that a defendant to a bill is a defendant in every character, which the statement of the bill shews he bears. The facts stated give him the character. The bill states the death of Col. Barret without issue; the appointment of A. Rokeby Brydges and A. Egerton Brydges, as executors; that A. Rokeby alone duly proved the will in the Ecclesiastical Court, and that he is sole legal personal representative. Now, this is not true in law. When there are two executors, it is not true that the proving executor is the only representative, until it is stated that the other executor renounced. In point of law, A. Egerton Brydges was as much a representative of Col. Barret as A. Rokeby Brydges. A. Egerton Brydges, in his answer, states, that A. Rokeby Brydges died intestate, and that he (A. Egerton) is the sole legal personal representative of Colonel

Barret, and he answers the bill in that character. He admits that a gross fraud had been committed on the trust funds. He does not here make any defence as a trustee. He does not admit assets; he submits to an account of what he may have received. In truth, this defendant has answered the original bill in both characters.

Objection overruled.

Mr. Stinton then objected, that the personal representative of A. Rokeby Brydges was a necessary party. The original bill stated, that A. Rokeby proved the will, and possessed himself of the personal estate and effects of Col. Barret. There was a positive statement of A. Rokeby having had assets of Col. Barret in his hands, and the representative of A. Rokeby must be brought before the Court.

Mr. Chandless and Mr. Hubback, contra. —The character of A. Rokeby Brydges, as executor of Col. Barret, vanished by his death. If he had any assets of Col. B. in his hands at the time of his death, the representative of A. Rokeby is a debtor to the estate of Col. Barret, and it is not necessary to make a mere debtor a party. The plaintiffs might, if they had pleased, have brought the representative of A. Rokeby before the Court, but it was at their option.

THE VICE CHANCELLOR.—The original bill states, as a positive fact, that A. Rokeby did possess himself of assets of Col. Barret. The bill of revivor and supplement denies this merely on belief and information. Now, which of these two statements is true? And who is to say which of them is true? It appears to me, that the parties who may be most affected should have their option. I think the first should be regarded as the truth. It is a positive averment, while the latter speaks only of the plaintiff's information and belief. I am bound to take it, that A. Rokeby Brydges did possess himself of assets of Col. Barret, and I think the defendants have a right to have the personal representative of A. Rokeby before the Court.

Ordered to stand over to amend.

March 1.—Upon the cause coming on after amendment,—

Mr. Bethell appeared for the plaintiff.—The lands which form the subject of the last

purchase are not really worth more than 7,596*l*. Mr. Tatham, a most respectable surveyor, valued them in October 1839, and three other gentlemen lately valued them at sums from 8,000*l*. to 10,000*l*. The proceedings in the Master's office have been most fraudulent. Westfield's affidavit is false, and was got up by Col. Barret and Brooks to deceive the Master. Wathen's affidavit is eleven days anterior to the execution of the deed he swears to have been duly executed. Mr. Brooks, no doubt, induced him to swear that affidavit; it is clear that all parties more or less participated in the fraud which has been committed. Messrs. Brooks & Grane took an active part in it; and that they received a bonus for their so doing, there can be little doubt. Mr. Cooper, although he is morally guiltless, yet, being a partner in the firm, must have received part of such a bonus, and must have been aware that all was not right, though, as a professional man, his character remains unstained. Mr. Quillinan was, no doubt, a tool of others, but he must have been also aware that the scheme was fraudulent, and for Col. Barret's benefit. Mr. Branfil also could not have been wholly ignorant of it, and should have exposed it. It is for the Court to decide, whether the papers in this case should be laid before the Attorney General, and the parties implicated in the fraud indicted for a conspiracy, or whether they should be removed from their situation, as having abused the trust reposed in them.

Mr. Chandless and Mr. Hubback, on the same side.

Cholmondeley v. Clinton, 19 Ves. 272.

Willet v. Chambers, Cowp. 814.

Rapp v. Latham, 2 B. & Ald. 795.

Stone v. Marsh, 6 B. & C. 551; s. c. 5 Law J. Rep. K.B. 201.

Mr. James Russell and Mr. Craig, for Mr. Branfil.—Mr. Branfil was a country gentleman living upon his own estate; he has never done anything to warrant a charge being made against him; he had no knowledge of the plan until 1831; he only acted under the approval of the Master; he is not responsible for the acts of others. The instant he became acquainted with the nature of the transaction, he took proceedings to bring it to light; but when it is considered that it would fix a stain upon his nearest

relatives, it cannot be wondered at that he abandoned that course.

Mr. Walker and Mr. Parry, for Mr. Brooks.—The whole transaction was a family arrangement, and known to all the parties interested, and was rather beneficial than otherwise to those in remainder. There are affidavits from competent surveyors valuing the property in question at 18,660*l*. Westfield was not known to Mr. Brooks; and so far from the firm of Messrs. Brooks, Grane, & Cooper gaining anything by the transaction, it was rather detrimental to them, and the cash account was for old debts due to the firm. The indemnity to Mr. Branfil was personal, and no decree could affect it.

Mr. Richards and Mr. Stinton, for Mr. Grane.

Sainsbury v. Jones, 2 Beav. 462.

Bowles v. Stewart, 1 Sch. & Lef. 209.

Arnot v. Biscoe, 1 Ves. sen. 95.

The Solicitor General and Mr. Romilly, for Mr. Cooper.—Mr. Cooper was entirely ignorant of the state of Col. Barret's affairs, until the suit instituted by Mrs. Whitby, and he then spoke to Mr. Brooks upon the subject, and a deed of indemnity was subsequently executed by Brooks & Grane to Mr. Cooper, upon a covenant by him to join with them in the necessary steps, for raising any sums which they might be ordered to pay into court, in respect of this transaction. Mr. Cooper accordingly joined in the indemnity to Mr. Branfil.

Cases cited upon the legal question respecting the liability of an innocent partner for the acts of his fraudulent co-partners:—

Moreton v. Hardern, 4 B. & C. 223.

Longman v. Poole, Dans. & Llo. 126.

Mr. Piggot, for Mr. Quillinan.

Mr. Wakefield and Mr. Hansard, for Messrs. White, Cooper, and Sterry, the trustees for the indemnity deed to Mr. Branfil, by Messrs. Brooks, Grane, & Cooper.

Collyear v. the Countess of Mulgrave, 2 Keen, 81; s. c. 5 Law J. Rep. (n.s.) Chanc. 335.

Worrall v. Harford, 8 Ves. 4.

Mr. Nevinson, for the Rev. A. E. Brydges.

Mr. Stewart and Mr. Elmsley, for Mrs. Holmes.

Mr. Bethell, in reply.

April 16.—**THE VICE CHANCELLOR.**—The substantial question in this case is, what ought to be done with respect to the 22,600*l.*, obtained out of court in 1830. [His Honour then stated the will, and the act of parliament obtained by Col. Barret, and his death.] The rights of the parties were determined by the act, and the children of Mrs. Quillinan, and Mrs. Swann, who are defendants, claim under them. The sale and investment of the surplus were optional with Col. Barret; but upon his non-consent, an equity arose for the remainder-men, to compel an investment in lands of equal value and title. Messrs. Brooks & Grane obtained the act, and they, till 1825, and Mr. Cooper with them since, acted in all the transactions under the act as Col. Barret's solicitors, as also for the trustees, who must have known something of those transactions. Colonel Barret's father, Sir Samuel Brydges, was seised in fee of some estates, which were mortgaged, and entitled to others for life, with remainder to the Colonel, who, in July 1822, writes to him as follows:—"The plan is to sell; and when the money is in the accountant general's hands for you to take it if you choose, for the smallest portion of land to be settled in lieu, which can be done by the approbation of a Master, which will be done by having as high a valuation as possible put upon any lands which you may choose to be so disposed of." Had this been carried out fairly, there would have been no objection to it. Westfield's affidavit, and, in fact, the general manner in which the sale to Mr. Quillinan was made, were effectual to deceive the Master relative to the value of the property, as otherwise the disproportion of the prices of the buying and selling must have attracted his attention. The abstracts are, in many things, inaccurate, such as being marked A. B. and C, B. being, in fact, the first, and that in which alone the consideration was mentioned. Mr. Wathen, who was the person employed to draw these abstracts, was very young at the time, which countenances the supposition that they were not made with a design to mislead, though they had that effect; but the Court must still consider them as fraudulent, as to the transaction of which they form a part. The affidavit, made relative to the abstracts being true and faithful, is evidently

untrue, as Mrs. Whitby did not execute a deed (therein stated to have been duly executed) till some time after. The whole of the proceedings, regarding the sale, in the Master's office, appear to have been conducted in a direct spirit of anticipation; and the approval of the title, which certainly afterwards took place, was taken for granted by Mr. Brooks, as appears by his letter to Master Dowdeswell. The Master's report, that the conveyance was executed by the proper parties, was made upon Mr. Wathen's affidavit; and all the parties to the release adopted the transaction, and Mr. Brooks, under a power of attorney from Mr. Quillinan, received the purchase-money, 22,600*l.* All this machinery emanated from the office of Messrs. Brooks, Grane, & Cooper, with more or less privity of Col. Barret, his father, Quillinan, and the trustees; and Quillinan's release purports to be made pursuant to an order made really afterwards. Upon all this, setting aside the suspicion of design, is it not certain that the Court and the Master were deceived by positive misrepresentation, otherwise the Master could not have approved of the title? The Court is bound, upon such a responsibility, to require that the statements, upon which it acts, should be strictly true. I am willing to believe that Mr. Wathen, being very young, believed all would be right, and, to expedite the matter, acted, as we have seen, without sufficient reflection. The Court was still deceived; and I am clearly of opinion, that all the parties to the transaction became answerable for so much of the 22,600*l.* as was not applied lawfully. I cannot distinguish Mr. Cooper from his partners; the Court cannot regard them as its officers individually, but the act of the firm as of every one of them. The safety of the public requires this. [His Honour then went into the evidence of different surveyors, relative to the value of the estates in question.] The evidence upon the value of the lands is not very satisfactory, and induces me to think, that 22,600*l.* was by no means the fair value of the lands and tithes; and on the correspondence generally, I have not the slightest doubt, that if it shall turn out that the purchase was not worth 22,600*l.*, a fraud was practised upon the Court, and that Sir Samuel Brydges, the Colonel, and Brooks,

contrived it, and became responsible so far as the value shall turn out to be less than 22,600*l.* Mr. Quillinan acted under what, as appears by his answer, he thought a fiction of law; but, although I do not impute to him any knowledge of the fraud or wish to defraud, he acted thoughtlessly out of kindness; his concurrence was necessary, and he is responsible. The trustees, who, upon the least inquiry, would have seen all was wrong, committed a dereliction of duty, and, though innocent of fraud, are also responsible. It has been said, that the petition to get the money out of court should have been by Col. Barret under the act, but he might waive that right by concurring in a petition for sale of the Exchequer bills by the trustees; therefore the trustees might properly have presented such a petition, with Colonel Barret's consent; and a general authority from the trustees would have enabled the solicitors to have presented such a petition; and they, no doubt, had a general authority to act for the trustees. I think Mr. Grane and Mr. Cooper are personally responsible, for although they had no actual knowledge of the fraud till after it took place, they could not have been without some suspicion of it. I find, on examination of the original correspondence, which I was anxious to see, that it did not relate to the transaction in such a manner, that if Mr. Cooper had read it, he could have obtained a knowledge of the fraud, so that I consider the moral character of Mr. Cooper unaffected. Grane signed several letters in the name of the firm, and he appears necessarily to have been acquainted with some part of the business, though not of the scheme concocted between the Colonel and Brooks. I consider Mr. Grane's character equally unaffected by the transaction. Mr. Brooks appears to have entered unwillingly into the transaction. He seems to have allowed himself to be overborne, against his better judgment, by the importunity of Col. Barret, and the view of his distressed circumstances. Though the claims of Col. Barret on the trust estates is not clear, there is good ground to suppose that his family lived upon him. Mr. Brooks's letters shew that the Colonel made himself responsible for some of his father's debts. The plaintiff, Sir John, was placed at Whitmore by the Colonel, and

sums, to the amount of 1,676*l.* and upwards, were paid for him, most probably by the Colonel, as no other person did, or could, or was liable to pay. These matters should be considered in favour of Mr. Brooks, whose letters are full of affectionate expressions of regard towards Col. Barret, and shew that he preferred the Colonel's views to his own. Mr. Brooks, in his first answer, states, that he attended the Master only once, and informed him that Quillinan was purchasing to effect a family arrangement, and that he (Quillinan) was interposed to prevent the mortgagees having notice of such arrangement, and that the conveyance, with a blank left, was not executed. That is a very material statement, but there is no evidence to support it, though Mr. Brooks might have examined the Master in chief. It is said, that the bill cannot be sustained, because Mr. Swann, the committee of the lunatic plaintiff, and himself a plaintiff, knew of and approved of the sale to the trustees; but there is no evidence that he knew what the transaction really was, or had reason to suspect its fairness, so that there was no ground for the objection. The relief asked was not solely on the ground of fraudulent price; but it was said, that the lands purchased were not contiguous but dispersed. The question is, whether the Master was deceived, for unless he was, the Court cannot relieve. Westfield's affidavit says, "which lie intermixed with or adjoining certain lands belonging to the trustees of the act, and are most convenient and desirable to be held therewith." Now, some of the lands proposed to be purchased were contiguous to those purchased in 1824, and as those lands formed part of the trust estate, it might be desirable to purchase them, and certainly more so than more distant lands; therefore Westfield's affidavit is strictly true in part, and not necessarily false in the remainder, and in that respect I do not think relief can be given. The substantial ground for relief in the fraud is the excessive price. The bill asks alternately to set aside the transaction altogether, or to have relief by restitution of the excess of the price above the value. It seems to me, considerable difficulty would arise from setting aside the whole transaction, but the relief should rather be, to have that money made good to

the trust estate, which was improperly taken out of court; in that respect following the order upon Branfil's petition, which, though made by consent, had the Lord Chancellor's sanction. To a certain extent the decree must be in the nature of an inquiry, and hypothetical, because I have not sufficient evidence to shew what was the proper price to have been paid for the lands and tithes. I think, therefore, that all I can do at present is this, to refer it to Master Dowdeswell to inquire what, on the 8th of January 1830, was a fit and proper price to have been given by the defendants, Champion Edward Branfil and Anthony Egerton Brydges, for the purchase of the lands and tithes conveyed to them for the sum of 22,600*l.*; and in case that it shall appear that a less sum than 22,600*l.* was a fit and proper price to have been given, then I declare, that the defendants, Champion Edward Branfil, Anthony Egerton Brydges, Edward Quillinan, James Sheffield Brooks, William Grane, and Thomas Cooper, and the personal assets of Sir Samuel Brydges and Col. Barret, are jointly and severally liable to make good the loss to the trust estate, occasioned by paying the sum of 22,600*l.* instead of the proper price. I have considered the deed of the 25th of November 1833, the benefits of which are entirely confined to the parties to it. Indirectly, the plaintiffs may have the benefit of it. By pressing Branfil, he may be induced to call upon the trustees of the deed to make the funds in their hands available for him, but the plaintiffs have no right to call upon them. The bill, therefore, must be dismissed as against the defendants, Richard Samuel White, Charles Cooper, and Wasey Sterry, with costs; and the consideration of all other costs and further directions, with respect to such legal estate as may be vested in Quillinan, under the conveyance from Mrs. Whitby, and other matters, must be reserved till after the Master has made his report: that is what I propose as to the decree at present, leaving it open to the parties to speak to it as to the minutes. It was stated to me at the hearing, that Quillinan, when the bill was amended, obtained an order to defend *in forma pauperis*, but I have not seen the order.

WIGRAM, V.C. }
Feb. 19, 21. } SUTTON v. TORRE.

Legacy—Joint Tenancy.

Bequest by a testator to his daughter H. B. M. S. and her younger children:—Held, that the daughter and her younger children took absolute interests as joint tenants of the fund.

Lord Scarborough made a codicil to his will, dated 11th of October 1834, as follows: "Head of instructions to my solicitor J. Lee, to add to my will the codicil following: In addition, &c. I leave to my dear wife Lady S, 80,000*l.*, or interest thereon, at 5*l.* per cent. out of my different investments; and, at her decease, 50,000*l.* of that sum to go to my daughter Lady F. C. and children, for their sole use and benefit, &c. To my daughters A. M. S. and L. F. S, each 20,000*l.* = 40,000*l.* Ditto, Dr. H. B. M. S, &c. 10,000*l.*; the residue of my property to be divided into three equal parts, viz.:—To my daughter L. F. C. and children, for their sole use and benefit, one part; daughter H. B. M. S. and her younger children, one part; and one part between my brother T. H. L. and Sir W. L. for their joint lives; then, after their decease, to be divided between the first and second parts, viz.: my daughter L. F. C. &c. and my daughter H. B. M. S. and her younger children. The same executors and trustees, &c. This is my last will and testament. Scarborough."

The initials H. B. M. S. were admitted to mean Lady H. B. Manners Sutton, and L. F. C. Lady Louisa Cator; and the question in the cause was, whether, upon the construction of the words of the residuary clause, Lady H. B. Manners Sutton took a life interest in the residue, with remainder to her younger children, or whether she and her children took equally as joint tenants.

It was mentioned, that in the case of the bequest to Lady L. Cator, the Vice Chancellor of England had held, that the mother took an estate for life, with remainder to her children.

Mr. Sutton Sharpe and *Mr. Lloyd*, for the plaintiffs, the younger children of Lady H. B. M. Sutton, contended, that the mother and children took equally, and not in succession—

Wild's case, 6 Rep. 17, a.

Alcock v. Ellen, Freem. C.C. 186.

Cook v. Cook, 2 Vern. 545.

Oates v. Jackson, 2 Stra. 1172.

Buffar v. Bradford, 2 Atk. 220.

That as there were no words to import severance, the parties took as joint tenants

Cray v. Willis, 2 P. Wms. 529.

Mr. Cockerell, for Lady H. B. Manners Sutton.

Mr. Girdlestone and *Mr. Godb *, for two of the trustees of the marriage settlement.

Mr. Boteler, for the two other trustees.

Mr. Temple and *Mr. Roupell*, for the trustees of the settlement of Lady H. B. Manners Sutton's second marriage.

Mr. Tennant, for the legal personal representatives of the Earl of Scarborough.

Mr. Sutton Sharpe, in reply.

February 21. — WIGRAM, V.C.—I find it has been assumed in this case to be clear, that the initials H. B. M. S. refer to Lady H. B. Manners Sutton. This then is a bequest by the testator of a residue to his daughter and her younger children. In the case of a bequest of personalty to A. B. and C, they would no doubt take as joint tenants. In the case of a gift to a class of persons, as children or grandchildren, they would take as joint tenants. And if, instead of being a bequest to a class, a stranger be added, they would still take as joint tenants. The question is, whether, if one of the class be in a different degree, *ex. gr.*, a mother, the case is the same. I am of opinion, that upon principle the case is the same; and the cases seem to warrant the conclusion, that it should be so. But, it is said, that the Vice Chancellor of England has put a different construction upon another part of the will. I have mentioned the case to his Honour, who, so far from having any doubt on the point, mentioned, that he had lately decided a case in which he had confirmed the doctrine of joint-tenancy to the fullest extent. The question is, whether there is anything in this case to vary the construction. In the case of Lady L. Cator, the bequest to her in the will was to her for life, with remainder to the children. In the codicil, it is "to my daughter Lady F. C. and children, for their sole use and benefit;" in the

subsequent bequest, it is to "my daughter Lady F. C. &c."—whereas in the case of Lady H. B. M. Sutton, it is given to her, not for her sole use, or to her and all her children, but to "her and her younger children," without any "&c." to denote any uncertainty or reference to what had gone before. I have not before me the circumstances which were held to take L. Cator's case out of the rule as to joint-tenancy; and, therefore, I am not at all impeaching the correctness of the Vice Chancellor of England's judgment, when I say, that in this case I find nothing to justify me in departing from the usual construction. I must therefore declare, that under the codicil, the mother and her younger children are entitled, as joint tenants, to the fund in question.

K. BRUCE, V.C. } EDWARDS v. BROMFIELD.
May 9.

Practice.—1st New Order of 11th of April 1842.

The affidavits in support of a motion made pursuant to the 1st New Order of April 1842, ought to be not only sufficient in substance, but technically sufficient, and to adopt the very words of the order.

Mr. Wright moved, that the bill might be taken *pro confesso* against the defendant, pursuant to the 1st New Order of the 11th of April 1842. There were no distinct allegations in the affidavit, used in support of this motion, that the plaintiff "was ignorant where the defendant then was," or that the plaintiff "had been unable with due diligence to procure a writ of attachment to be executed against the defendant," though, from the circumstances stated, such inferences might be drawn.

KNIGHT BRUCE, V.C. said, that the power given to the plaintiff by this order, was so great, that he should require the affidavits in support of a motion made in pursuance of it, to be not only sufficient in substance, but also technically sufficient, and that the very words of the order ought to be used.

The motion was ordered to stand over.

WIGRAM, V.C. }
 Feb. 17, 18; } TIPPING v. POWER.
 Mar. 8, 10. }

*Equitable Mortgage—Deficient Security—
 Executor—Retainer—Disclaimer—Costs.*

Bill by equitable mortgagee, on behalf of himself and all other creditors, to administer the estate of the testator, praying a sale. The devisees of the estate disclaimed; and the executors claimed to retain debts due to them from the testator out of the assets come to their hands.

The proceeds of the estate being insufficient to satisfy the mortgage debt, and the general assets being insufficient to pay the costs of the suit,—Held, that the mortgagee was entitled to the whole proceeds of the sale without deduction:—that the executors were entitled to retain their debts and their costs out of the general assets in priority; that the plaintiff's costs, as mortgagee, was the next claim; and that the surplus was to be applied pro rata to the costs of the other defendants.

The disclaiming parties not entitled to costs, as such, being proper parties at the time of filing the bill.

This was a suit by an equitable mortgagee, on behalf of himself and all the other creditors of the testator W. T. Power, for the administration of the estate; and the defendants were H. Power and J. Archer, the executors, and the parties beneficially interested under the will. The bill prayed a sale of the mortgaged premises. The parties beneficially interested under the will disclaimed all interest in the mortgaged premises.

By the decree, made at the hearing of the cause, the plaintiff was declared equitable mortgagee; and it was referred to the Master to take an account of what was due, on the mortgage security, for principal and interest, and to sell the premises, and to take an account of the personal estate of the testator, not specifically bequeathed, come to the hands of the defendants, his executors, &c., an account of testator's debts, &c., and for payment of the same; and the residue of the money to be paid into court; and the Master was also to inquire what other real estate the testator died possessed of. The Master reported, that there was due to the

plaintiff on his mortgage security, for principal and interest, 127*l.* 7*s.* 1*d.*; that the mortgaged premises had been sold for 115*l.*; that there had come to the hands of the executors of the testator, personal estate, not specifically bequeathed, 524*l.* 13*s.* 4*d.*; that they had paid 579*l.* 15*s.* (including a sum of 27*l.* retained by J. Archer, and 129*l.* 19*s.* 8*d.* retained by H. Power, for their respective debts due to them from their testator's estate), which sum the Master had allowed them in their discharge; and that 53*l.* 1*s.* 8*d.* was due to the executors on the said account; that one creditor only had come in and proved a debt of 18*l.* 18*s.* 6*d.*; and the Master found, that the only other real estate of the testator was a freehold estate at B. mortgaged for 850*l.*, which had been since sold by the mortgagee, under a power of sale, for 1195*l.*; and that, after deducting the principal, interest, and costs, the surplus 237*l.* 14*s.* 11*d.* had been paid over to the executors, and was now in their hands.

The cause now coming on, on further directions, the questions raised, were—first, whether the mortgagee was entitled to have the 115*l.* paid in the first instance, in satisfaction of his mortgage debt; secondly, whether the costs of the suit had priority over the right of retainer in the executors, the fund in court being otherwise insufficient to pay all parties their costs.

Mr. Wakefield and Mr. Koe, for the plaintiff.—The mortgagee is entitled to be paid in full before costs are paid to any party.

Appleby v. Duke, supra, p. 194.

Cash v. Belcher, supra, p. 196.

White v. Bishop of Peterborough, Jac. 402.

Brace v. the Duchess of Marlborough, Mos. 50.

In *Chisum v. Dewes* (1), the equitable mortgagee was held entitled to the whole produce of the sale. So in *Collins v. Shirley* (2), and he may pursue all his remedies—*Davis v. Battine* (3). In *Mason v. Bogg* (4), Lord Cottenham dissented from the doctrine laid down in—

Greenwood v. Taylor, 1 Russ. & Myl. 185.

(1) 5 Russ. 29.

(2) 1 Russ. & Myl. 633.

(3) 2 Ibid. 76.

(4) 2 Myl. & Cr. 447.

Cooke v. Brown, 9 Law J. Rep. (N.S.)

Ex. Eq. 41.

Wontner v. Wright, 2 Sim. 543.

Allen v. Martin, Rolls, Feb. 12, 1841.

The right of retainer only gives the executor priority over other creditors in equal degree, and he cannot retain in priority to the costs of the suit—*Loomes v. Stotherd* (5).

Mr. K. Parker and *Mr. Armstrong*, for the devisees of the mortgagor.—These parties having disclaimed upon the record, are no longer necessary parties, and are therefore entitled to the costs of the suit—*Woodward v. Haddon* (6). As to the retainer, the costs of the creditors' suit are the first charge—*Loomes v. Stotherd*. The costs of the suit must come out of the fund.

Browne v. Lockhart, 10 Sim. 420.

Ex parte Garbutt, 2 Rose, 78.

Kenebel v. Scrafton, 13 Ves. 370.

Bennet v. Going, 1 Mol. 530.

The costs of the suit must be paid rateably out of the fund as far as it will extend—*Swale v. Milner* (7).

Mr. Sutton Sharpe, for the executors.—*Chisum v. Dewes* establishes the executors' right of retainer, even against the costs of the suit. The dictum in *Loomes v. Stotherd* was not a point in the cause. If the fund is subject to the right of retainer, that right will precede the question of costs, and the fund being in court will make no difference. In 2 *Williams on Executors*, 762, the principle of retainer is set out. Suppose a creditor sues the executor, and is paid out of the assets, and a creditors' suit is afterwards brought, it is quite clear that the debt so paid would not contribute to the suit; but the executor retains as if he had obtained judgment against himself; the retainer, therefore, must override the costs of the suit, and the right is not prejudiced by the payment into court—*Langton v. Higgs* (8). The executor is entitled to his costs in priority to the plaintiff—

Young v. Everest, 1 Russ. & Myl. 426.

Bennett v. Going, 1 Mol. 530.

(5) 1 Sim. & Stu. 458; s. c. 1 Law J. Rep. Chanc. 220.

(6) 4 Sim. 606; s. c. 1 Law J. Rep. (N.S.) Ch. 106.

(7) 6 Ibid. 572.

(8) 5 Ibid. 228; s. c. 1 Law J. Rep. (N.S.) Ch. 150.

Mr. F. Hall, for the purchaser.

Mr. Armstrong.—The case of *Young v. Everest* was overruled by *Larkins v. Paxton* (9).

March 10.—WIGRAM, V.C.—The plaintiff in this case has filed a creditor's bill to enforce payment of a debt owing by the testator to him. This debt arose out of the sale of an estate by the plaintiff to the testator; and, part of the purchase-money being unpaid, the plaintiff claims a lien for that sum. The accounts have been taken, and the estate has been resold, and the proceeds are in court, being the sum of 115*l*. The executors themselves are creditors upon the estate for 156*l*., and there is also one other debt of 18*l*. 18*s*. 6*d*. The total of the assets, including the proceeds of the sale, is 299*l*. 13*s*. 3*d*. The amount of the debts, with the costs, will exceed that sum. The question arises with respect to the disposition of the costs. The plaintiff, filing his bill to be paid out of the real estate, was obliged to make parties to the bill the persons entitled to the real estate. First, with respect to the costs of these parties: they admit the case to be as alleged by the bill, but they say by their answer, they have disclaimed all interest in the equity of redemption, because it is worth nothing; and that as they have disclaimed, they are intitled to their costs up to the time of the disclaimer; or, if not, then they are entitled to their subsequent costs, because the bill ought then to have been dismissed against them. I am decidedly of opinion that they have no such right. Lord Redesdale was cited as laying it down, that where a party disclaims he is entitled to his costs. That is true, in this sense: if the disclaimer shews that the party never had an interest, or, if he had, that he had parted with it before the bill was filed, he would have his costs, because he was improperly made a party; but if he had an interest at the time of filing the bill, the mere fact of his saying upon the record that he finds his interest worth nothing, does not prove that he was improperly made a party, and therefore he does not come within the scope of Lord Redesdale's observation. I had occasion to consider this point in *Fewster v. Turner* (10)

(9) 2 Myl. & K. 320.

(10) *Ante*, p. 161.

and *Cash v. Belcher*. In both those cases, after inquiry and examination, I was clearly of opinion that a party disclaiming in that sense, was not entitled to his costs; and the reason is, because the plaintiff, being obliged to bring him before the Court, could not, as mortgagee, be obliged to pay his mortgagor his costs, and he could not get rid of him before the hearing without paying him his costs; therefore, the plaintiff has no option, but to bring him to a hearing. *Hunter v. Pugh* is a strong authority for this proposition; for the previous cases had given the provisional assignee of an insolvent debtor his costs, on the ground of his being a public officer; and Lord Cottenham decided that he stood in the same situation as any other party. These costs then must be disposed of according to the general rule. The next question is, whether any part of the costs of the suit are to be paid out of that fund produced by the sale of the mortgaged estate, or whether the whole ought to go as a clear fund into the hands of the plaintiff. If the case is looked at upon principle, there can, I think, be no question about the right of the plaintiff to have the costs paid out of the general estate. He says, "By my contract I am owner of the property to the extent of my lien: if there is not sufficient, let me be paid the deficiency out of the general assets." If the proposition is true, and it is true that he is owner of the fund by contract, I cannot see why the Court should take any part from him. I was referred to four cases as shewing the practice on this point — *Brace v. the Duchess of Marlborough*, *Kenebel v. Scrafton* (which case, in *Upperton v. Harrison* (11), is said to be inaccurately reported as to facts), *White v. the Bishop of Peterborough*, and *Wontner v. Wright*. None of those cases are similar in specie to this. *Brace v. the Duchess of Marlborough* was a case of a number of persons seeking to have their respective priorities ascertained, and the parties, not being obliged so to do, agreed to a sale, and that their rights should be adjusted in that way; and the Court held there, that the costs of the suit were the costs of administering the estate. *Kenebel v. Scrafton* was a suit among several mortgagees and their mortgagor, and the first

mortgagee consented to a sale. *White v. the Bishop of Peterborough*, and *Upperton v. Harrison*, were similar cases. In all the cases the Court expressly says, that the first mortgagee is entitled to have the whole property applied in liquidation of his debt; but they also say, that in that case he must insist on his right of foreclosure; if he chooses to have the estate sold, he introduces a new mode of winding up the estate, to which his contract does not entitle him; and if the costs are the costs of administering the fund, they ought to be paid in the first instance. The benefit the mortgagor is supposed to get is this: if the security is insufficient, he gets by foreclosure less than the amount of his debt; if there is a sale, he gets what he can, and recovers the difference from the general estate. Whether that is so or not, the principle is clear that the costs of administering the fund must be first deducted. Even in that case the decisions are not uniform. In *Upperton v. Harrison*, the Vice Chancellor of England held, that the first mortgagee took the clear fund without the deduction of costs. I certainly do not think that that case falls within the reason of these cases. I will first take *Greenwood v. Taylor*. Sir J. Leach says, if a creditor comes after the death of a mortgagor to have his debt paid, his remedy is to sell the mortgage, to apply the proceeds, and to come for the difference. In *Mason v. Bogg*, Lord Cottenham disapproved of that decision. In *Hunter v. Pugh*, which was a question of a mortgage, Lord Cottenham said, that the mortgagee had a right to have his security made available in every way. The only ground upon which, in those other cases, the costs are treated as costs of administration is, that the mortgagee is asking an indulgence of the Court. When the legal mortgagee comes against the assets, he is doing the same thing which the law authorizes a legal mortgagee coming against the assets to do, namely, to sell the estate, and to prove for the difference. It is so stated in *Cruise's Digest* and other text books, that the mortgagee having his bond and covenant, the Court will sell the legal mortgage, and the party may prove for the difference. In *Brocklehurst v. Jessop* (12), that was manifestly the opinion of the Vice

(11) 7 Sim. 444.

(12) 7 Sim. 438.

Chancellor of England, that in the administration of assets the Court will sell the mortgage, and allow the party to prove for the difference. In addition to that, there is the authority of the Master of the Rolls, in *Allen v. Martin* (13), who said that the mortgagee consenting to a sale, could not have waived his right to have the whole proceeds of such sale. Without saying that I should be at liberty to depart from the authority of *Brace v. the Duchess of Marlborough*, it is sufficient to say, that in this case I am not obliged to adopt that principle, for this reason: in the case of a legal mortgagee the argument goes upon this—that his strict right is foreclosure; but if he chooses to consent to have the estate sold, he abandons his original right by taking that benefit. This does not apply to an equitable lien; for the very contract is, that he shall have power to sell, and therefore, by selling, he takes what his contract gives him, and nothing else. Upon these authorities, I am satisfied that the rule of the Court obliges me to apply the whole of the proceeds in satisfaction of the unpaid vendor's debt. The remaining question is as to the retainer. There is no doubt that the executor has a right to retain his debt, and that the fact of the money being in court makes no difference; but, it being a simple contract debt, the Court will not allow the executor to retain the money in his hands, but will have it brought into court, and will ultimately hold his position the same as if he still had it in his hands. If an executor says, I have paid so much money in satisfaction of a debt, he is either not charged with it, or, if charged, is allowed it in his discharge. If he could say, I have retained my own debt, he is in the same situation; but the Court does not allow him so to deal with it. If he is not able to deal with it, then it is said to be a portion of the fund which the Court is to administer, and it must bear its proportion of the costs. Till the accounts are taken, the Court cannot admit of a right of retainer; but when the Court has determined that there is no creditor of higher degree, the executor must be remitted to his original position. *Chisum v. Deves* decided this point. I have no hesitation in following that decision, and I think that is the sound

reason of the case. That leaves the case to be wound up in a simple way. The 115*l.* is to go to the plaintiff; the executors will retain their debts; then the surplus will go to pay the costs. The question then is, in what order the costs are to be paid. *Bennet v. Going* lays down the right rule. The executor gets his costs first, because the Court will not take the fund out of the hands of an executor till he is paid his costs. The question then is, who is the next person in highest degree? The plaintiff, as owner of the estate. The decree will be, that the plaintiff is entitled to the clear produce of the sale; the plaintiff to pay the purchaser's costs and add them to his own; that the executors are entitled to retain their debts, and to be paid their costs as between solicitor and client, in priority, out of the other fund; the plaintiff to be paid his costs as mortgagee out of the residue of the fund; the remainder of the fund, if any, to be apportioned between the other defendants for their costs. The disclaiming parties not entitled to any costs as such.

L.C. }
April 19. } MOSS v. BALDOCK.

Practice.—Second Rehearing.

A second petition of rehearing, before the Lord Chancellor, presented without the special leave of the Court, ordered, on the application of the opposite party on motion, to be taken off the file with costs, together with the common order, directing the same to be set down to be heard.

This was a motion, by the defendants, to take the petition of rehearing, presented by the plaintiffs, off the file, and also to discharge the common order made for a rehearing on their application. The cause had been heard as an original cause before Lord Chancellor Cottenham, who reserved the question, whether the defendants were to be charged with interest; it was afterwards heard before the Vice Chancellor, who held, that there was no ground for charging the defendants with interest; from the Vice Chancellor's decree, the plaintiffs appealed to the Lord Chancellor, who decided that they were entitled to certain interest against

the defendants, but not to the whole extent sought by them. The minutes of the decree, made at the rehearing by Lord Cottenham, were produced in court, with corrections in his Lordship's handwriting.

Mr. G. Turner and Mr. Prescott White, in support of the motion.—The plaintiffs ought to have applied to the Court, on notice to the opposite party, for leave to rehear, and not to have taken the order to rehear as of course.

Fox v. Mackreth, 2 Cox, 158.

The East India Company v. Boddam, 13 Ves. 421.

Deerhurst v. the Duke of St. Albans, 2 Russ. & Myl. 702.

Waldo v. Caley, 16 Ves. 206.

Mousley v. Carr, 3 Myl. & K. 205; s. c. 10 Law J. Rep. (N.S.) Ch. 260.

The Attorney General v. Ward, 1 Myl. & Cr. 449; s. c. 6 Law J. Rep. (N.S.) Chanc. 95.

Byfield v. Provis, 3 Myl. & Cr. 437.

In *Booth v. Creswicke* (1) it was held, that the objection to the petition for a second rehearing, ought to have been taken before the petition came on to be heard, and unless it can be made to appear, that the present case is distinguishable from ordinary cases, the defendants are right in the course they have taken. Besides, the decree, for the rehearing of which the present petition has been presented, was settled in minutes, by Lord Chancellor Cottenham himself. The case of *Wood v. Griffith* (2) is an authority for taking the present petition off the file, on the ground of its containing a variety of matters set out at great length, which were not before the Court on the former hearing; but *Harris v. Start* (3), and *Grove v. Sansom* (4), are authorities shewing that where there is a clear irregularity in form, the party guilty of the irregularity will not be permitted to enter upon the merits of his case. Wherever any collateral or extraneous circumstances exist, they must be brought before the Court by affidavit, upon motion or petition; but an affidavit cannot be used at the time of the rehearing.

(1) Cr. & Ph. 361; s. c. 9 Law J. Rep. (N.S.) Chanc. 113.

(2) 19 Ves. 550.

(3) 4 Myl. & Cr. 261.

(4) 1 Bea. 297.

Mr. Wakefield, contra.—The case of *Booth v. Creswicke* has no application to the present case; and in *Wood v. Griffith* it was attempted to introduce a case inconsistent with that appearing on the record, and an incidental dictum by a single Judge, as in *Byfield v. Provis*, is not binding on the suitors in like manner as the settled and constituted practice of the Court is; there must be a rule actually promulgated before the practice of the Court can be considered as altered; and nothing more having occurred as to the present point, than the expression of an intention to promulgate a new rule, the old practice remains. The plaintiffs are entitled to have the opinion of two Judges on the question raised by them, and that in the present case they have not had. Then consider the expense of such a course of practice as that now insisted on by the defendants, according to which, an applicant would not have leave given him to rehear a case, unless he could prove to the satisfaction of the Lord Chancellor that there existed good ground for the application; and if the party succeeded in his application, he must still incur the additional expense of a formal petition of rehearing.

Marsh v. Hunter, 3 Mad. 437.

Fox v. Mackreth, 1 Harg. Jur. Arg. 453.

The LORD CHANCELLOR, without hearing the reply, stated, that he considered the rule settled by the cases of *Deerhurst v. the Duke of St. Albans* and *Byfield v. Provis*, in the latter of which cases, Lord Chancellor Cottenham observed, that for the future the rule must be understood to be peremptory, and that special leave was necessary where a second rehearing was required; that, in the opinion he had formed, he was confirmed by the observations of the Master of the Rolls, in the case of *Deerhurst v. the Duke of St. Albans*, in which he fully concurred; that it was incorrect to say, that Lord Chancellor Cottenham had not delivered judgment on the rehearing before him, in the present case, inasmuch as the minutes of the judgment produced in court, contained corrections in his Lordship's own handwriting; that nothing could have been more solemnly decided than the present case, when heard by that learned Judge; that the minutes produced contained emphatically the judgment of the Lord Chancellor, and therefore

the petition, on account of the irregularity, must be taken off the file, and the costs must follow the result of the application.

V.C. }
May 6, 7. } DAVENPORT v. COLTMAN.

Devise—"Possessed of."

A testator, after bequeathing certain sums of money to his daughters M. and C, and legacies to other persons, with the possession of a certain house to his wife for life, declared thus: "that my said daughters M. and C. shall divide between them, as residuary legatees, whatever I may die possessed of, except what is already mentioned in favour of others."—Held, that the words "whatever I may die possessed of," included the real estate, and that M. and C. were therefore entitled to the fee simple in expectancy of the house bequeathed to the testator's wife for life.

An issue was directed by the Vice Chancellor, to the Court of Exchequer, and after hearing counsel, Rolfe, B. delivered the following, as the judgment of the Court, which, as it contains the whole of the facts, is inserted at length :—

ROLFE, B.—This case was sent by his Honour the Vice Chancellor of England, for the opinion of this Court, upon the construction of the will of George Coltman, a will which was duly executed and attested for passing real estate, and bearing date the 26th of March 1828, and, so far as is material, is in the following words :—There is a gift of a number of small legacies and then, "To my daughter Mary Newbold, I bequeath the sum of 250*l.* per annum, and in case of her death, and without issue, the same sum to her husband, for his natural life, and afterwards to be equally divided between my son George Coltman and daughter Charlotte Coltman. To my daughter Charlotte Coltman, I bequeath the sum of 250*l.* per annum, and in case she should continue unmarried, or die without issue, the same shall be taken possession of by her brother George Coltman. To my son George Coltman, I bequeath the sum of 3,000*l.*, which he is not to receive till after the death of his mother, and likewise, at her decease, all the

plate which I may die possessed of; but, at my decease, he is to have immediately the whole of my library at his own disposal. That my wife, Mary Coltman, may be left in as comfortable a situation as possible, I bequeath to her, for her natural life, the possession of my house in Stanley Place, Chester, together with the plate, china, linen, and household furniture, and all the joint property in houses in Liverpool, likewise of interest of money as often as due, arising from the 3*l.* and 4*l.* per cents., and to have and to hold the same during her natural life, save and except the clauses in favour of my daughters, as already mentioned. At her decease, it is my will and pleasure, that Mary Newbold and Charlotte Coltman shall divide equally between them, as residuary legatees, whatever I may die possessed of, except what is already mentioned in favour of others." Then there are some small legacies, and then he proceeds, "I appoint my wife executrix, John Eden, Esq. and my son Thomas Coltman, executors. As for the houses in Liverpool, they may dispose of any one or the whole of them, whenever the same may be thought advisable, for the benefit of the parties concerned; but the house in Chester must not be sold as long as my wife lives." The testator, at the date of his will, and until his decease, which happened a few months afterwards, continued seised in fee simple of the house in Stanley Place, Chester, the house mentioned in the will, and of two real estates, situate one in the county of Lincoln, and the other in the county of Herts. The questions upon which our opinions are desired, are, first, whether the widow takes any and what interest in the Lincolnshire and Herts estates; secondly, whether the daughters took any, and if any what, interest in those estates and the Stanley Place house, or either of them. The case turns upon the construction to be given to the words of the will following the gift to his wife, viz. "At her decease, it is my will and pleasure, that Mary Newbold and Charlotte Coltman shall divide equally between them, as residuary legatees, whatever I may die possessed of, except what is already mentioned in favour of others. On the part of the daughter, it is contended, that under this clause they took the fee simple of all the real estate, subject only to the widow's "life interest" in the Stanley Place house.

The heir-at-law, on the other hand, contends, the clause in question does not extend to the real estate at all, but is confined to the leasehold houses in Liverpool, and other personal estates. Although, in cases like the present, it is always difficult to arrive at conclusions satisfactory, yet, on a full consideration of this will, we think it clear beyond any fair judicial doubt, that under the words, "whatever I may die possessed of," the testator intended to include his real estate, as well those in the counties of Hertford and Lincoln, as the house in Chester. The testator was evidently making his own will, without legal assistance to guide him in the use of his expressions; and although the words are not those which a conveyancer would use to convey a real estate, of which a party might die seised, yet they cannot be said to be insufficient to embrace property of that description, if they were meant to do so. In *Huxstep v. Brooman* (1), a gift of "all I am worth," was held by Lord Thurlow to include real estate, and the authority of that case has never been questioned. On the contrary, in *Doe v. Rout* (2), the Chief Justice, Lord Mansfield, expressly said, Lord Thurlow decided rightly; and in *Doe v. Morgan* (3), Bayley, J. assumes, it is quite clear, that the words, "all I have," and "all I am worth," must include real estate. Now surely it would be difficult for a person not perfectly conversant with legal language to understand the reason why the words, "whatever I may die possessed of," should not be at least as comprehensive as the words "all I am worth," or "all I have." It rarely happens, in fact, that a party making a will, does not intend to include everything over which he has a disposing power; and it was in a great measure from this circumstance, that the Courts have been led to give a comprehensive meaning to general expressions, used by a testator in disposing of his real estate, though whether it might at first have been wise to require, before the heir should be disinherited, expressions of less equivocal, or more technical nature, it is no part of our business to discuss. The principle of a more liberal construction having been adopted, we think it would be unsafe to admit of very refined distinctions

between such expressions, as "all I am worth," and "all I have," and "all I am possessed of," which, according to common usage of mankind certainly, we think, have been considered as having precisely the same meaning. It is not, however, absolutely necessary for us to say what would have been the effect of the words in question, if they had stood alone, but we think there are other parts of this will strongly indicative of an intention to include real estate in the residuary gift. In the first place, the testator had clearly real estate in his mind, since he expressly gave a life estate to his wife in the Stanley Place house; this always has been considered a circumstance favouring the presumption that general words were intended to include real as well as personal property, but that presumption is, in this case, very much strengthened by the concluding paragraph of the will, in which the testator directs the Stanley Place house shall not be sold until after his wife's death. That paragraph can hardly be read as a power to sell, but rather as a restriction imposed on the power of sale, which the testator assumes to have been already given, express or implied, by the previous provisions of the will. There is no charge of debts, no purpose whatever by which a sale can possibly be necessary or expedient, except that of more conveniently dividing the house, as part of what he was possessed of, between his daughters; and we think it impossible not to see that the testator considered that the proceeds to arise from the sale of the Stanley Place house, if sold, were to go in the same manner as the proceeds of the sale of the leasehold house; and this could only be because the former, as well as the latter, were supposed by him to be included under the words "whatever I may die possessed of." The Stanley Place house was, if it should be deemed expedient, to be sold by the executors, but not till after the wife's death, and then whenever it might be thought advisable for the benefit of the parties concerned. It is certainly impossible that the testator could have authorized his executors to make sale of the house, after it should become the absolute property of the heir, or that he would have described the heir as the party concerned. These considerations appear to us to lead irresistibly to the inference, that the testator considered

(1) 1 Bro. C.C. 437.

(2) 7 Taunt. 82.

(3) 6 B. & C. 518; s. c. 5 Law J. Rep. K.B. 268.

the Stanley Place house as part of what he had given under the description of "all I die possessed of;" and that being so, we think the other real estates are necessarily treated in the same way. If the words in question, "all I die possessed of," extend to the real estate at all, there is nothing to point their meaning to one part of the real estate, to exclude the rest. The argument we have relied upon, as to the sale, is founded, not in regard to the Lincoln and Hertford property; but what we deduce from the argument is, that the testator considered himself to have used the words, "all I may die possessed of," in a sense which must include the Stanley Place house, which could only include it by also including the whole of the real estate. We further think, that the daughters' estate cannot be less than an estate in fee simple. The testator looked to a sale, and the division of the proceeds, as the most convenient method of dividing, and that is inconsistent with the notion of the daughters taking only a partial interest, for their lives, or any other terms. On the part of the heir-at-law, it was pressed upon us in the argument, on the authority of several decided cases, that we ought to restrict the meaning of the word "possessed" to subjects of the same nature as those previously disposed of, more especially looking at the direction that the subject-matter of gift should be divided between his daughters, as the residuary legatees,—an expression, it was contended, strongly indicative of an intention to dispose of the personal estate only; but, in answer to this argument, it was contended, the previous gift had not been confined exclusively to personal estate; and after all, the rule of construction in the cases referred to, confining general words to personal estate, is a rule which must always give way, when there exist, and we think there do in this case, other circumstances plainly and strongly shewing that the words were meant to have their fullest effect and meaning. The words "residuary legatees" are certainly not technical, when applied to devisees of real estate, but the testator was evidently unacquainted with the ordinary language of conveyancing; and he might have thought, that as a sale would probably take place, and so his daughters would take the money value of the property, and not the property itself, therefore the words "residuary legatees" would be

most appropriate; at all events, the use of the words does not appear to us to raise a doubt sufficiently strong to outweigh the other circumstances. It seems to us, however, to be clear that the daughters took nothing in the Lincolnshire or Hertfordshire estates, until after the wife's death; and we shall certify also that they took the Stanley Place house, in fee simple in remainder in expectancy on the death of the wife, and took the other estate in fee simple. With regard to the claim of the wife, we think it unfounded. The circumstance that the devise is not to take effect until after the death of the third person, is not sufficient to give to such third person an estate by implication, unless there be something, as where the devisee is himself the heir, to shew it was not intended to go to the heir in the meantime; nothing of the sort occurs here. The testator might permit the Hertfordshire and Lincolnshire estates to go to the heir during the widow's life; there is nothing to shew the contrary; and it is pretty plain from the express gift of the Stanley Place house to the wife, that no other part of the real estate was intended for her. Upon these grounds, we shall certify our opinion, that she took no interest whatever in the Lincolnshire and Hertfordshire property.

The case now came on upon further directions, upon the certificate of the Court of Exchequer.

Mr. Bethell and *Mr. Willcock*, for *Mrs. Davenport*, a daughter of the testator, argued in support of the opinion expressed by the Court of Exchequer, and cited,—

Monk v. Mawdsley, 1 Sim. 286; s. c. 5 Law J. Rep. Chanc. 149.

Huxtep v. Brooman, 1 Bro. C.C. 437.

Hopewell v. Ackland, Com. Dig. 168; s. c. 1 Salk. 239.

Barnes v. Patch, 8 Ves. 604.

Pitman v. Stevens, 15 East, 505.

Hyley v. Hyley, 3 Mod. 228.

Doe v. Tofteld, 11 East, 246.

Murray v. Wise, 2 Vern. 564.

Wilce v. Wilce, 7 Bing. 664; s. c. 9 Law J. Rep. C.P. 197.

Noel v. Hoy, 5 Madd. 38.

Mr. Koe, for *W. H. Newbold*, the heir-at-law of the testator's daughter, cited, in support of the certificate,—

Doe v. Lainchbury, 11 East, 290.

Doe v. Langlands, 14 *ibid.* 370.

Mr. Richards, for the heir-at-law of the testator, opposed the decision of the Court of Exchequer.

Timewell v. Perkins, 2 Atk. 102.

Doe v. Rout, 7 Taunt. 79.

Henderson v. Farbridge, 1 Russ. 479 ; s. c. 4 Law J. Rep. Chanc. 209.

Thomas v. Phelps, 4 Russ. 348 ; s. c. 6 Law J. Rep. Chanc. 110.

Mr. Lee, (with *Mr. Richards*).—In any case of doubt, the heir must not be disinherited. In all the cases cited, there was some expression made use of by the testator, shewing that he intended his real estate to pass. Here, there is nothing to induce that conclusion. To disinherit the heir there should be words of great force, instead of which, we find the expression, "whatever I may die possessed of," which is always used to denote, that chattel interest alone is intended to be passed ; the words "possessed of" are never used to pass freehold estate, and have never been held to do so in any case.

Roe v. Yeud, 2 New Rep. 214.

Wilkinson v. Merryland, Cro. Car. 447.

Shaw v. Bull, 12 Mod. 593.

Bebb v. Penoyre, 11 East, 160.

Mr. Kenyon Parker, *Mr. T. Parker*, and *Mr. Mylne*, for other parties.

THE VICE CHANCELLOR.—I am clearly of opinion, the judgment of the Court of Exchequer is right. I am glad that this case has been so fully discussed, as I believe most of the principles of law, and most of the cases that could be cited on the subject, have been quoted ; but the great use of quoting cases, when the question is what is the meaning of a particular will is, that you may by the cases establish some rule of law, which, perhaps, may be doubtful, or you may shew that certain words have received a given meaning. Besides that, it does not appear to me, that, generally speaking, the citing of a number of cases of construction upon a vast variety of wills made by different persons, tends to illustrate the particular question which is before the Court, namely, what was the meaning of a given testator, whose will is under consideration. Now I am quite willing to admit the rule of law is, that the heir takes whatever is not given away ; about that there is no doubt ;

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and I am quite willing also to admit, that such a word as the word "effects," simply by itself, would be *primâ facie* taken only to be applicable to personal property, but I will put this case with respect to the word "effects." Suppose a man were seised in fee of divers tenements, A, B, and C, and he made his will, and said, "I give all my effects to my wife, except my tenement A," there is no doubt, I should conceive, that though there might be first of all a clear disposition to say, that "effects" would only pass that which was of a personal nature, yet the exception would shew what it was the testator intended by the use of the word "effects." I should state how it appears to me this will ought to be construed. It appears upon the face of it, to be a will made by a medical gentleman ; and a total absence of the knowledge of law, I think, appears upon the will from the beginning to the end of it ; but it is not to be held, that merely because a man does not use legal phrases, that therefore he is to be taken, at all events, to die intestate : that cannot be the law.

Now, we will examine what the testator in question himself said ; first of all, he states himself to be a doctor of physic, and then he says, "I revoke all my former wills. To my son Thomas Coltman, I bequeath my gold watch, chain, and seals, my carriages, harness, and horses, and cows, market-cart, and harness to the same, also whatever is considered as belonging to me at my new residence in Hagnaby Priory."

Now, that expression struck me as the expression of a man who, by the very use of it, shews that he was not likely to understand legal phrases, or very conversant with precision of language, because it is observable he does not give what belongs to him, but whatever is considered as belonging to him. Then he goes on to say, "To my daughter Mary Newbold, I bequeath the sum of 250*l.* per annum, and in case of her death, and without issue, the same sum to her husband for his natural life, and afterwards to be equally divided between my son George Coltman and daughter Charlotte Coltman."

An observation arises there upon the use of the phrase, "and without issue." I am not called upon at present to decide what that means, for it is quite plain a question will arise upon those words. He then says, "To my daughter Charlotte Colt-

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man, I bequeath the sum of 250*l.* per annum, and in case she should continue unmarried, or die without issue,"—then he has carried on the phrase, "the same shall be taken possession of by her brother George Coltman. To my son George Coltman I bequeath the sum of 3,000*l.*, which he is not to receive till after the death of his mother, and likewise, at her decease, all the plate that I may die possessed of, but, at my decease, he is to have immediately the whole of my library at his own disposal. That my wife, Mary Coltman, may be left in as comfortable a situation as possible, I bequeath to her, for her natural life, the possession of my house in Stanley Place, Chester, together with the use of her plate, china, &c." and so on.

Now, I lay no stress upon the words, "That my wife, Mary Coltman, may be left in as comfortable a situation as possible," because he does not, by his will, profess to give her everything; and therefore it is merely an expression generally of an intention to make his wife comfortable, but, of course, taking care to limit the degree of comfort that shall arise in the enjoyment of his property. "I bequeath to her, for her natural life, the possession of my house in Stanley Place, Chester, together with the use of the plate, china, table and household furniture, and all the joint property in houses in Liverpool, and likewise of interest of money as often as due, arising from the 3*l.* and 4*l.* per cents., and to have and to hold the same during her natural life, save and except the clauses in favour of my daughters, as already mentioned," which appears to me to shew that the testator thought, that if he had not made the exception, that he would thereby have given to his wife, for her life, all the interest arising from the 3*l.* and 4*l.* per cents., and, therefore, during her life, must have prevented the daughters from having respectively the two annuities of 250*l.*, which, in a preceding part of the will, are given to them. Now, it is observable, that in this part of the will I have already read, he has given not merely interests in chattels, but a freehold interest in a freehold of inheritance; and then he proceeds, "At her decease, it is my will and pleasure, that Mary Newbold and Charlotte Coltman shall divide equally between themselves, as residuary legatees,

whatever I may die possessed of, save and except what is already mentioned in favour of others." And upon that the substantial question on this part of the case arises.

Now, first of all, it was said, that the words "possessed of" do not imply, and cannot be said to comprehend real property. I think Mr. Lee's expression was, "of their own force the words would not apply to real property." Now, is that so? In the first place, there are two sorts of language in the law,—there is the language of pleading, and there is the language of conversation or of writing on the subject of law, which are materially different; but I do apprehend that the expression, "possessed of a fee simple," is a perfectly good expression, used by the highest authority; because if you will look into the 8th section of Littleton, you will find this expression. He puts the case on the position of law, that "*possessio fratris de feodo simplici facit sororem esse hæredem.*" That is the way it is sometimes expressed. He has expressed it distinctly. He says,—"Where a man is seised of lands in fee simple, and hath issue a son and daughter, by one venter, and a son by another venter, and die, and the eldest son enter, and die without issue, the daughter shall have the lands, and not the younger son; yet the younger son is heir to the father, but not to his brother. But if the elder son does not enter into the land after the death of his father, but die before any entry made by him, then the younger brother may enter and shall have the land as heir to his father; but where the elder son, in the case aforesaid, enters after the death of his father, and hath possession, there the sister shall have the land, because *possessio fratris de feodo simplici facit sororem esse hæredem.*" Now it is quite plain, therefore, that not using the language of pleading, but using the language of the most correct kind that ever was used, from the language of Littleton, "possession" is the proper word to describe the seisin of the fee simple. Now it is a very remarkable thing, that Coke, in his commentary upon the passage, states this proposition—"Possessio fratris de feodo simplici facit sororem esse hæredem." Hereupon, four things are to be observed, every word almost being operative and material:—First, that the brother must be in actual possession," and then he states his

reason; but that does not make his authority in law less because he was a bad etymologist; he gives this absurd reason, for "*possessio est quasi pedis positio*,"—that is the way he chooses to interpret it; but still there is his express authority to shew, that by possession he speaks of the actual possession, and the actual possession of the fee simple; and it is a remarkable thing, that, in a passage a little before that which I have just now mentioned, he puts the case in which he makes the possession of the lessee for years, the possession of the tenant in fee simple, which shews it is the same possession of the thing of which he speaks, for he says,—“If the father maketh a lease for years, and the lessee entereth, and the father dieth, the eldest son dieth during the term before entry or receipt of rent, the younger son of the half blood shall not inherit, but the sister, because the possession of the lessee for years is the possession of the eldest son;” and therefore, it is perfectly plain, that whether it were a possession by himself, simply, or by the lessee for years under the lease of the father, there is actually that possession of the fee simple which shall make the sister the heir. I only mention it for the sake of shewing, that in one of the earliest books we have, the phrase “possession” is expressly used to designate the seisin of a fee simple. I also find that Mr. Thomas Leach, the author who has been quoted by Mr. Lee as an authority that the term “legatee” cannot be applied to a person who is to take a freehold, has actually himself used the expression “legatee,” instead of “devisee,” in the case of *Hyley v. Hyley*, 3 Mod. 228. Then in the case of *Thomas v. Phelps*, Sir John Leach says, “The subject of the gift is, all that he possessed in any way belonging to him, by them freely to be enjoyed or possessed, of whatsoever nature or manner it might be. These words are equivalent to a gift of all his property, and a gift of all property will not only pass real estate, but will pass all the interest of the testator in that estate.” And then he makes an observation which I will call your attention to presently. Now, upon the mere words, “whatever I die possessed of,” I should say, simply, that they would comprehend, not merely the personal interests, but also estates in fee simple. But it is still more plain in this particular case,

because the very exception that the testator has made, marks the thing which was passing in his mind, and of which he was speaking when he used the phrase, “whatever I may die possessed of;” for he says, “whatever I may die possessed of, save and except what is already mentioned in favour of others.” Now, what had been already mentioned in favour of others? There had been mentioned in favour of others, not mere chattels personal, and mere interest of a personal nature, but there had been mentioned the possession of the freehold during the life of the wife. Then the exception being of a general nature, applying to anything which has been already mentioned in favour of others, has this effect—that by the words, “whatever I may die possessed of,” he considered he would have passed everything that had been given to others, unless he had made the exception; that is to say, in other words, that by making the exception, he has marked the extent and operation which, in his own mind, he thought his own phrases would have put on his own property; and, therefore, you have not only, first of all, the general plain meaning of the words unincumbered by any legal form,—“whatever I may die possessed of,” but you have the thing pinched down to a certainty by the very nature of the exception which the testator uses; and it was with reference to that, when I looked at the case of *Thomas v. Phelps*, that I was struck with the observation of Sir John Leach, for he says, “The exception of the household furniture is of little weight here.” It might be of very little weight in the case of *Thomas v. Phelps*, but it is of very great weight in this case; because it appears to me to put it beyond doubt, that the testator was speaking with respect to estates of inheritance as well as with respect to mere interests of a personal nature. Then he says, “I give and bequeath the small sum of 50*l.* to my much esteemed friend, John Eden, Esq., attorney-at-law in Liverpool; to Betsy Moffit, I give and bequeath the sum of 18*l.* per annum for her natural life,—this is done as a small token of friendship for her long and important services in my family. That the intention of this my will may be carried into execution, I appoint my wife my executrix, and John Eden, Esq. and my son Thomas Coltman, executors. As for the

houses in Liverpool, they may dispose of any one or more of them, whenever the same may be thought advisable"—they are mere leaseholds for years—"for the benefit of the parties concerned; but the house in Chester must not be sold so long as my wife lives." Now, I do not enter into the question, whether the testator has given a power of sale or not, but it is pretty plain to me, that he had something floating in his mind as to a power to be executed by the executors, as I should presume, for the purpose of a division; but my observation upon it is this—that if he has, in a preceding part of the will, clearly given to the children, at the decease of the wife, all that was not given to others, the circumstance that there may be a doubt as to what he meant the executors should do, cannot have the effect of cutting down what is perfectly plain. If there is a clear devise, that clear devise must operate, unless there be some specific devise, equally clear, to cut it down; and it is impossible to say, by any construction of these loose words at the end, that they have the effect of destroying that which, in my apprehension, was given in clear terms to the wife. I do not think any difficulty arises from the circumstance Mr. Lee pointed out, that on the face of the will there is an inconsistency in part. No doubt there is. It is only the house in Stanley Place, Chester, which is given to the wife for life; but when he has given everything to his daughters at the decease of his wife, he has left, as a matter of course, to descend to the heir, until the death of the wife, all those tenements, the reversion of which, after the death of the wife, is given to the daughters; and I must say, from the time I first read this will to the present moment, that I have never had the least doubt upon the construction of it, and I cannot think it right, therefore, to send this question back again to any court of law.

WIGRAM, V.C. }
Feb. 12. } COOK v. BLACK.

Assignment—Policy—Notice.

A. effected a policy on his life in an insurance company, and, by the conditions indorsed thereon, the company engaged, in case of the assured committing suicide after hav-

ing "assigned" the policy bonâ fide as a security, to pay to the assignee the amount for which it was a security to the extent of the sum assured. A. deposited the policy with B. as a security for money lent, with an undertaking in writing to assign the same when required, and afterwards committed suicide:—Held, that B. was entitled to recover from the company the amount of his debt, though he had given no notice of the deposit to the company previous to A.'s death, and though he had not obtained a formal assignment.

The plaintiff was the assignee of a policy of assurance effected in the Britannia Life Assurance Company, and the defendants, Black and two others, were directors of that company, and the other defendant was Mrs. B., administratrix of J. B., deceased, upon whose life the policy was effected. The bill stated, that in May 1838, J. B. was indebted to the plaintiff in the sum of 240*l.*; and, for the purpose of securing that debt, and any further advances to be made by the plaintiff, it was arranged that a policy should be effected in the name of J. B., that he might have the interest in the policy after he had discharged the debt; that a policy was accordingly effected in the said company for 700*l.* in the name and on the life of J. B., and the plaintiff paid the first premium thereon, amounting to 22*l.* 0*s.* 5*d.*; that the policy was then deposited with the plaintiff, and on the 20th of July 1838, J. B. signed the following memorandum: "To J. Cook, Esq.—Sir, I will leave in your hands the policy of insurance for 700*l.*, as a collateral security for the payment of 260*l.*, and any other sums that may at any time be due from me to you upon bills of exchange or otherwise, and I will assign the same to you when requested so to do." (Signed) J. B. That there were further money transactions between the plaintiff and J. B., and that J. B., at the time of his death, was indebted to the plaintiff in the sum of 389*l.*, exclusive of the 22*l.* paid for the premium. In Feb. 1839, J. B. committed suicide, and died intestate and insolvent.

Among the conditions and regulations of the office indorsed on the policy were the following: "If the person insured shall commit suicide, and the policy have been assigned to any person having a *bonâ fide*

interest in his life to the extent of the sum assured, the full amount will be paid to the party so interested; if the sum be less than the amount insured, the party will be indemnified to the full extent. If the person assured commit suicide, and there shall have been no assignment, the directors shall have the option of paying the sum assured, or returning the full amount of the premiums received." On the death of J. B., the plaintiff applied to the company for payment of the sum due to him from J. B. as secured by the policy, which was refused. The plaintiff then filed his bill against the company and the administratrix for an account, &c., and to enforce payment against the company. The defence set up by the directors in their answer was, 1st, that there was no valid legal assignment of the policy; 2ndly, that no notice of the assignment was given to the company before the death of J. B.; and 3rdly, they disputed the *bona fides* of the interest claimed therein by the plaintiff.

Mr. Sutton Sharpe and Mr. Shapter, for the plaintiff.—Assignment is good without any special form—*Row v. Dawson* (1). The assignment is valid without notice, and notice is only required in questions of priority between incumbrancers.

Edwards v. Scott, 1 Man. & Gr. 962; s.c. 10 Law J. Rep. (N.S.) C.P. 11.

Duncan v. Chamberlayne, 10 Law J. Rep. (N.S.) Chanc. 307.

Williams v. Thorp, 2 Sim. 257.

Mr. Lloyd and Mr. J. Bacon, for the defendants.—A policy effected to secure a debt, is generally taken in the name of the creditor. The plaintiff must establish that he has brought himself within the terms of the conditions, before he can claim the benefit of them. Here there has been no actual assignment, but only a *promise* to assign when requested. The Court will not carry into effect an executory agreement without consideration. The company in this case are no parties to the consideration for the assignment. If notice had been given of the assignment, it would have been perfect. The absence of notice is evidence that the plaintiff knew that he had no actual assignment of the policy.

(1) 1 Ves. sen. 381.

WIGRAM, V.C.—Upon some parts of the case I have no doubt. In the first place, it is due to the company to say that they were perfectly justified in putting the party to strict proof. The first question would be, how the case would have stood between the holder and J. B. himself. The effect of the transaction was, to give to the plaintiff in this court a right to enforce payment of his demand out of what was due upon the policy. How would the case have been if J. B.'s estate had been entitled to the money in case of his *natural* death? It is quite clear, as between the assignor and assignee, the plaintiff would be entitled to be paid out of what was coming to the estate of J. B. Whether the right accrued by a deposit of the policy, or by a formal assignment, can make no difference. The effect of the transaction in equity is, to give him all that an assignment would give him; and the letter does in fact assign the benefit of the policy. This is not a question of mere form, but a proposition of substance. In a transaction between the assured and the person lending money to him, where the assured gives the party a right to take the payment of the money out of the policy, it is in truth an assignment. That being clear, the question is, whether there has been such an assignment as the conditions require. If I put that meaning upon it, the whole transaction is rational. The meaning of the condition is, that the assured should have the power of negotiating the policy; so that any person advancing money upon it should have a security, notwithstanding the assured should commit suicide; and thus the policy was more valuable as a negotiable security, if, after dealings between the assured and another party, which would constitute that party an assignee of the policy, he should have the full benefit of it. At all events, upon that interpretation, the condition is intelligible. Strictly, there can be no legal assignment of a policy; but it was said that the office meant to stipulate for an assignment in a particular form; but the words of the condition are general—"If the person assured shall assign." Therefore, I must construe this term, as I construe the words of the letter, that they will pay the amount of the policy to a third person who had *bona fide* advanced his money. It was properly admitted at the bar, that notice to the office

was not of the essence of the assignment, but that the absence of notice was evidence of the *mala fides*; but there is sufficient evidence in the case to justify me in holding that the plaintiff is entitled to be paid his debt out of the policy. The defendants, however, are entitled to an inquiry, whether the plaintiff has any other securities by means of which he could obtain payment.

WIGRAM, V.C. } ATTORNEY GENERAL v. CORPORATION OF NEWARK.
Feb. 14, 15. }

Charity Lands—Sale.

A very special case of benefit to the charity must be made out to induce the Court to direct a reference to the Master, as to whether it would be for the benefit of the charity, that any part of the charity lands should be sold.

The original information was filed by the Attorney General against the corporation of Newark, praying an account of their dealings with certain charity estates. By the decree it was referred to the Master to take an account of the rents and profits of the charity estates, then in question, received by the corporation since September 1822, and to inquire whether the defendants had any other general property, whereby they might answer what should be found due on such account. The Master found, that the corporation was possessed of certain lands in Stockwell Street, in Newark. The Master proceeded to sell this property in four lots, and W. became the purchaser of three, and H. of the remaining lot. It was afterwards discovered, that the property so sold was held by the corporation upon charitable trusts, under the will of A. Collingwood. A supplemental information was then filed, suggesting that it would be greatly for the benefit of Collingwood's charity that this property should be sold; and it prayed a reference to the Master, to inquire whether it would be for the benefit of the charity of Collingwood that these premises should be sold; and if so, that they might be sold.

Mr. Blount, for the information.

[WIGRAM, V.C.—The whole of your proceedings were to protect the other charity, and to enforce a demand against the corporation in respect of it. But it now turns out,

that what was thought to be A's estate, is, in fact, B's. The proper way would be to rehear the information, and get rid of the sale altogether. The South Molton charity lands were ordered to be sold, and the expenses came to more than the value of the land.]

The Court has power to sell the lands, if a sale would be beneficial to the charity.

Attorney General v. Warren, 2 Swanst. 302.

Attorney General v. Hungerford, 8 Bli. 437; s. c. 2 Cl. & Fin. 357.

Mr. Skirrow, for the trustees.

Feb. 15.—WIGRAM, V.C. — The case appears to be this; an information was filed by the Attorney General, for the protection of certain charities, not including Collingwood's charity. A decree was made, in which a direction was contained, that the Master should inquire what property the corporation had, other than charity property. It was not the usual form of decree. The Master made the inquiry, and reported that the corporation possessed certain property in Stockwell Street. Under that decree, the property in question was sold in four lots. After this sale had actually taken place, the Attorney General discovered that the property sold belonged to another charity. A supplemental information was filed, stating the discovery made, and suggesting that it would be for the benefit of the charity itself that these sales should stand; and it prayed a reference to the Master, whether it would be for the benefit of the charity. I think there are insuperable difficulties in point of form; for the information was not filed for the administration of the charity lands now in question. If there had been no sale under the decree, there would have been no difficulty; for the Attorney General may at any time stay the proceedings in an information; but the fact of the sale raises the difficulty. The question now is one of substance. The application is, that the Master may inquire whether it will be for the benefit of Collingwood's charity, that the sales should stand. That assumes that it is proper for the Court to sell charity lands. *Mr. Blount* says, the Court has the power: no doubt it has; the trustees could do it; but if a court of equity sanctions a sale, it is bound to protect the purchaser. The question is, as

to the propriety of a sale. The only case that I know of, where the Court ordered charity lands to be sold, was the case of the South Molton charity. The consequence was, that fourteen cottages were sold in fourteen lots; fourteen abstracts were delivered, and the expenses of the sale exceeded the whole value of the property; and I have since been informed, that the whole charity has disappeared. That case is a caution against selling charity lands. In *The Attorney General v. Brooke* (1), the question was, whether a lease renewable for ever was good in the case of charity lands. Lord Eldon said, it was in effect a sale; and his language shews, that the Court ought not to allow it. In *The Attorney General v. Buller* (2), Lord Alvanley had directed a sale of charity property. On that case coming back on further directions, Lord Eldon made this remark, "That the Court must have been surprised into making the order for the sale of the estate. Even an act of parliament would not go so far; acts are sometimes passed to authorize the exchange of an estate, &c., but not to convert it into money." He thought that an act of parliament was necessary for the purpose; that when a trust was once fixed on the property, the Court had no right to change that trust. There are cases in which the Court has held, that the trusts of a grammar school could not be altered, because the person had given the lands for a particular purpose. In *The Attorney General v. the Haberdashers Company* (3), the Court got so far as to say, that writing and arithmetic were ancillary to learning grammar, and so writing and arithmetic might be introduced. The cases go upon this, that the Court has no right to vary a trust. I mention this because the sale of charity lands was spoken of too lightly. The Court has been called on to set aside long leases of charity lands, amounting in effect to a sale; and the Court has always said, that the inquiry must be whether the leases were proper at the time they were granted, because there might possibly be no impropriety in granting a long lease, *e. g.* a building lease. The Court, indeed, has said, on arguing the cases, "Charity lands might have been sold."

(1) 18 Ves. 326.

(2) Jac. 412.

(3) 3 Russ. 530.

With the exception of some cases referred to by Lord Redesdale, these points are put *arguendo*—*The Attorney General v. Warren* (4), *The Attorney General v. Kerr* (5), and *The Attorney General v. Brettingham* (6): that last case was a question, whether leases of charity lands should be set aside, and the Court merely said, that it had a right in a proper case to sell. In *The Attorney General v. Hungerford* (7), Lord Brougham, in moving the judgment of the House of Lords, said, charity lands may be aliened in fee. Suppose a small corner of charity land worth about 10*l.*, and some neighbouring opulent proprietor offers 1,000*l.* for it, this most extreme case the Court puts for the purpose of asserting, that it has jurisdiction. I cannot think, in that state of the authorities, that I can treat it as a mere matter of course that I should direct inquiries whether charity lands should be sold. The Court may have the power; but the question is, whether it is to be exercised as a mere matter of course. There is the strongest possible objection to it in this case: the proceedings all along are on behalf of another charity; in the course of those proceedings, there is a sale of the lands of Collingwood's charity. Then comes the supplemental information to bring the new trustees of the charity before the Court. This sale having taken place under an information filed for a different purpose, the Attorney General now asks an inquiry, whether that sale which was confessedly irregular, may not be for the benefit of this particular charity. There is not a single fact upon the information upon which the Court can proceed; but merely a suggestion that it might be for the benefit of the charity. I am quite sure, that the inquiry ought not to be granted, except on a very special case. If it were not so, the charity would have no chance.

Take the usual decree in the supplemental information as to the other charity; but dismiss the information, so far as it prays a reference to the Master, as to the sale of the lands of Collingwood's charity.

(4) 2 Swanst. 291.

(5) 2 Beav. 420; s. c. 9 Law J. Rep. (N.s.) Chanc. 190.

(6) 3 Beav. 91.

(7) 2 Cl. & Fin. 357; s. c. 8 Bli. N.S. 437.

WIGRAM, V.C. }
Jan. 29. } EGGINTON v. BURTON.

Practice.—Defendant out of the Jurisdiction—Proof.

A bill for an account alleged that a defendant, beneficially interested, was out of the jurisdiction, and the answer of the trustees admitted the fact:—Held, that such admission was not sufficient. The regular practice is, not to refer it to the Master to inquire as to that fact, and if he find it in the affirmative to proceed with the accounts, but to allow the cause to stand over, with liberty to the plaintiff to exhibit interrogatories before the examiner to prove the fact.

In 1834 the defendant Graham conveyed all his freehold and leasehold estates to the defendants, Burton and Woodhouse, for the benefit of his creditors.

This was a bill by a creditor against the trustees for the usual accounts; and it stated that Graham, at the time of filing the bill, was resident in France, and not likely to return. The trustees, by their answer, admitted that Graham was out of the jurisdiction.

Mr. James Russell, for the trustees, objected, that Graham, who had a substantial interest in the question, was out of the jurisdiction, and that the plaintiffs ought to have proved that fact in the cause, and could not read the answer of the defendants, the trustees, for that purpose; that the practice was, to allow the cause to stand over, with liberty to the plaintiff to exhibit interrogatories to prove that fact.

Mr. Anderdon and *Mr. Jeremy*, for the plaintiff, suggested, that the Court would direct an inquiry before the Master, whether Graham was out of the jurisdiction, with a direction that if the Master should find in the affirmative, he should then proceed to take the accounts.

Dale v. Forster, V.C., Feb. 1837.

Smith v. Hibernian Mine Company, 1 Sch. & Lef. 238.

Butler v. Borton, 5 Mad. 42.

Edney v. Jewell, Mad. & Geld. 165.

Lechmere v. Brasier, 2 Jac. & Walk. 288.

WIGRAM, V.C.—The rule of the court is, not to take the accounts against the trustees in the absence of the party interested. The

only exception to that rule is, where you state to the Court, and prove at the hearing, that the party beneficially interested is not within the jurisdiction. In some cases, the Court will then direct the accounts to be taken. But you must prove the fact of his absence. Here, there is no proof, but only an admission in the answer; and it has been decided by one of the most experienced Judges (Lord Cottenham), that such an admission is not sufficient proof to justify the Court in acting upon it. The regular practice is, to exhibit interrogatories before the examiner. It would be advisable to prove that he was out of the jurisdiction at the time of filing the bill, and to bring down that proof to the latest moment possible. Let the cause stand over, with liberty to the plaintiff to exhibit interrogatories as he may be advised, to prove the defendant out of the jurisdiction.

WIGRAM, V.C. }
Feb. 23, 24. } BROWELL v. REID.

Practice.—Receiver—Trustee.

Where some of several trustees named in a will decline to act, it is not of course to appoint a receiver on the application of the parties beneficially interested, the acting trustees not consenting to the order.

Jasper Browell, the testator, by his will, gave his real and personal estate to four trustees, upon certain trusts, for the benefit of the plaintiff and others, and gave the trustees a power to raise money on the estate, for the purposes of the will, by mortgage or otherwise. One of the trustees named, died in the lifetime of the testator, and another disclaimed the trusts of the will. It appeared that the acting trustees had sold part of the real estate, and let the purchaser into possession, without payment of the purchase-money. The bill was filed to administer the estate. The plaintiff was one of the parties interested under the will, and the defendants were the trustees, and the other parties beneficially interested. A motion was now made for a receiver to get in the outstanding personal estate of the testator, and the purchase-money of the real estate.

Mr. Sutton Sharpe and Mr. Heathfield, for the motion.—The testator having appointed several persons trustees, and one having died, and another declined to act, the parties beneficially interested are entitled to a receiver.

Brodie v. Barry, 3 Mer. 695, and

Beaumont v. Beaumont, cited there by Sir S. Romilly in argument.

Mr. Osborne, for the acting trustees and the widow contingently interested, *contra*.

February 24.—WIGRAM, V.C.—The only ground put forward for not allowing the trustees to act is, that the trustees, named in the will, will not all act. In my own experience, that was never a sufficient reason of itself; for the testator must have had in his contemplation the possibility of such an occurrence. Upon referring to the case of *Beaumont v. Beaumont*, in the registrar's book, it appears that one of the trustees was desirous of having nothing to do with the property, and the counsel for the other consenting to a receiver, the order was made: that case therefore is no authority for the broad proposition laid down. In *Tidd v. Lister* (1), Sir J. Leach put it expressly upon the consent of the acting trustee. There must be misconduct or consent.

Anonymous, 12 Ves. 4.

Middleton v. Dodswell, 13 Ibid. 266.

The only remaining point is, can the trustee say he has acted as he ought to have done? The purchaser has been in possession of the estate for some time without payment of the purchase-money, and there is no explanation of that. The best course will be, the trustees undertaking to demand payment of the purchase-money forthwith, let the purchaser be at liberty to pay his purchase-money into court, and let the motion stand over, with liberty to any party to apply.

WIGRAM, V.C. }

Feb. 23, 24; }

Mar. 2. }

CRAWFORTH v. FISHER.

Pleading—Supplemental Matter—Interpleader—Smallness of Amount—Vexation—Costs.

A. filed a bill of interpleader, and obtained an injunction against C, the consignee, and

(1) 5 Mad. 429.

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*D, who claimed a lien on the remittances, in respect of 496l., the net proceeds of goods in the hands of A. After the filing of the bill, A. received a further sum of 6l. in respect of average on such goods, which, though due previously, was not mentioned in the original bill, and both the defendants then for the first time claimed interest on the sum of 496l. A. filed a supplemental bill, stating the receipt of the 6l., and that the interest on the principal money was 65l., and praying that C. and D. might interplead in respect of these sums, and for an injunction. Upon this second bill, these monies were brought into court, and a second injunction obtained ex parte:—Held, first, that the 6l. received by A. after the original bill (though due before) was properly the subject of a supplemental bill. Secondly, that the smallness of the sum, viz. 6l., was not a ground of objection per se to a bill of interpleader. Thirdly, that this case was distinguishable from *Smith v. Target*, 2 Anst. 529, the 6l. being part of a larger demand. Fourthly, that the second injunction, obtained after the first had been submitted to for six months, and no proceedings threatened in respect of the sums mentioned in the supplemental bill, was vexatious, and the plaintiff was ordered to pay the costs thereof.*

This was an interpleading suit, and the plaintiffs were *Crawforth & Co.*, East India merchants, in London, and whose business consisted in making consignments of goods for third parties, to the houses of *Remington & Co.*, at Bombay, and *Colville & Co.*, at Calcutta, and in making advances thereon to the consignors, upon the credit of the remittances; and after deducting out of such remittances their advances and expenses, &c., in handing over the surplus to the consignors. The defendants, *F. and W.*, were the assignees of *Bazeley*, who, with *Hansbrow*, (also a defendant,) carried on business at Liverpool, in co-partnership, as manufacturers, till the bankruptcy of *Bazeley* in 1838. The defendants *M, L, and M.*, were the assignees of *Coupland & Duncan*, who carried on business at Liverpool, as commission agents, till their bankruptcy in 1836. It was stated by the bill, that the business of *Coupland & Co.*, among other things, consisted in procuring consignments of goods to be made by the manufacturers, through

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the plaintiffs' firm, to different houses abroad, and receiving from the plaintiffs' firm a per-centage on the goods so procured. In 1825-6, Coupland & Co. procured Bazeley & Co. to ship goods, through the plaintiffs' firm, the proceeds to be remitted to the plaintiffs' firm, who thereupon came under advances to Bazeley & Co. The goods were shipped, and the remittances made, and the plaintiffs' firm, after deducting their advances and expenses, &c., held the sum of 496*l.*, the net proceeds of the goods, for which they were primarily accountable to Bazeley & Co. On the 12th of January 1837, the assignees of Coupland & Co. served the plaintiffs with a notice, by which they claimed the 496*l.*, on the ground, that Coupland & Co. had come under advances to Bazeley & Co., upon the credit of the consignment to an amount exceeding the monies in the plaintiffs' hands. On the 12th of September 1838, a notice was served on the plaintiffs, by the assignees of Bazeley, claiming the money in their hands. In July 1839, the assignees of Bazeley commenced an action to recover this sum, and proceedings were also threatened by the assignees of Coupland & Co., for the like purpose. On the 30th of July 1839, the plaintiffs filed a bill of interpleader, and obtained an injunction upon an affidavit verifying the facts of the bill, and the 496*l.* was paid into court; and no attempt had been since made to disturb that injunction. After the institution of the original suit, and before answer, 6*l.* 16*s.* 6*d.* was received by the plaintiffs as average upon the goods; and a claim was then for the first time made on the plaintiffs, for interest on the 496*l.* On the 13th of December 1839, a supplemental bill was filed, stating the receipt, after the filing of the original bill, of the 6*l.* 16*s.* 6*d.*, and that the interest upon the 496*l.* amounted to 65*l.*, and the interest upon the 6*l.* to 3*s.* 6*d.*, and praying that the parties might interplead in respect of these sums also, and for an injunction, and offering to bring the money into court. In this supplemental suit, the monies were brought into court, and a second injunction obtained *ex parte*. On the 17th of December 1839, the assignees of Coupland & Co. put in their answer, denying that they were merely agents of the plaintiffs, and alleging that they carried on a distinct business by themselves, but admitting a course of busi-

ness like that represented by the bill; and they set up an agreement between themselves and Bazeley & Co., by which they were to have a lien on the remittances for monies advanced on the faith of the consignment. Bazeley's assignees and Hansbrow, by their answer, insisted upon their right to receive the whole sum from the plaintiffs, and denied the existence of any agreement, by which Coupland & Co. were to have a lien upon the remittances.

The plaintiffs had gone into evidence by the examination of witnesses, as to the state of the account, &c.

The original and supplemental bill now came on to be argued; and it was contended by the defendants, that this was not a proper subject of interpleader. Secondly, if it was, then that the supplemental bill was not proper; first, because the interest on the 496*l.* ought to have been included in the original suit; secondly, that the 6*l.* 16*s.* 6*d.* might have been named in the original suit, and credit given for it. Thirdly, that the 6*l.* 16*s.* 6*d.* (excluding the interest on the 496*l.*,) was too small a sum to be made the subject of a supplemental suit in equity. And that if the supplemental bill was sustainable, the plaintiffs ought to pay the excess of costs above an amendment, as a vexatious proceeding; and also the costs of the evidence they had gone into; and should not be allowed the costs of the second injunction, nor the costs of the extra affidavits of the first injunction.

Mr. Girdlestone and Mr. Bailey, for the bill.—This is a proper case of interpleader. Where a principal has created a lien in favour of a third party, on goods in the hands of his agent, the agent may file a bill of interpleader against the principal and the other claimant—*Smith v. Hammond* (1); and it is only necessary that the plaintiffs shall not have come under any personal obligation, independently of the question of property, &c.

Crawshay v. Thornton, 2 Myl. & Cr. 19; s. c. 6 Law J. Rep. (n.s.) Chanc. 179.

Suart v. Welch, 4 Ibid. 305.

Jew v. Wood, 1 Cr. & Ph. 185; s. c. 10 Law J. Rep. (n.s.) Chanc. 261.

Wright v. Ward, 4 Russ. 215; s. c. 6 Law J. Rep. Chanc. 42.

(1) 6 Sim. 10.

Up to the 6th of November 1839, the interest on the principal sum was not claimed by any of the parties. The 6*l.* 16*s.* 6*d.* received after the bill filed, rendered a supplemental bill necessary, and the including of the interest in that supplemental bill, was the proper mode of proceeding.

Mr. Sutton Sharpe and Mr. Rolt, for the assignees of Coupland & Co.—The plaintiffs cannot file an interpleading bill for a less sum than 10*l.*—*Smith v. Target* (2). The plaintiffs were bound to pay the interest into court, whether demanded or not, for they knew that it was due upon the account. The right to receive the 6*l.* attached before the original bill was filed; they might, therefore, have stated it in their bill as an unascertained amount. No action was threatened in respect of the 6*l.*, and the plaintiff must shew that he was in danger.

Mr. J. Russell and Mr. Geldart, for the assignees of Bazeley.—The plaintiffs, and Coupland & Co. as their agents, are the same persons as regards this consignment; the plaintiffs, therefore, were bound to hand over the produce to the assignees. As to the question of costs, the plaintiffs had no right to go into evidence.

[WIGRAM, V.C.—Only in this way: if the defendants deny the facts necessary to prove it an interpleading suit, then they may enter into evidence to prove those facts.]

The plaintiffs must pay the costs of the affidavit of merits, upon which the first injunction was granted—*Walbanke v. Sparks* (3): also the costs of the second injunction.

Mr. Girdlestone, in reply.—The moment the shipments were made, the contract with the plaintiffs was complete. Coupland & Co. state that their advances were made upon the security of the goods; if so, it must have been *after* the shipment, and then it is a proper case of interpleader. As to the 6*l.*, we were not bound to account for monies before we received them. As there was nothing stated, in the original bill, as to the 6*l.*, we could not have stated the payment of it by way of amendment.

March 2.—WIGRAM, V.C.—Up to the 11th of January 1842, the assignees of Coupland & Co. did not object to the suit; but insisted upon every other point. The first question is, whether the subjects of the two suits are, upon these pleadings, proper subjects for interpleader. I am of opinion, that they are proper. It is admitted, that where a warehouseman receives property as a bailee, and nothing is done before the claim by the depositor, the possession of the depositee must, in many cases, be the possession of the party making the deposit, and the relation of the two parties will be analogous to that of landlord and tenant; in which case, the relation of the parties will often preclude the latter from disputing the right of the former. This is very clearly explained in *Crawshay v. Thornton*. But the case assumes a different aspect, when the party has, by an act of ownership, transferred his interest to another: the party holding the goods may then file a bill of interpleader. The cases illustrating this, are too familiar to be cited. Even if I were to admit that the original bill might have been framed with more precaution, still the statements are consistent with the supposition, that the real transaction gives the plaintiff a right of interpleader. The assignees of Bazeley and Hansbrow, who now object that the case is not one of interpleader, have not demurred, but filed an answer, in which they distinctly admit that the alleged transactions between themselves and Coupland & Co., in respect of which they now claim a lien, were all subsequent to the contract in 1835-36, under which the plaintiffs came into possession of the monies in question. In an interpleading suit, where the plaintiff has no interest, and the contest is between the co-defendants, I must consider this sufficient to remove any equivocation or uncertainty, and that the averments in the answer are sufficient to relieve the plaintiffs. But I do not admit that the bill is open to observation in that respect; for it states facts that are known to both the defendants; and where a bill states that two claims are made upon a party for the same subject-matter, that is *prima facie* a case for interpleader; if the answer admits a case of interpleader, that is sufficient. Independently of the above, the assignees of Coupland & Co. have submitted since July

(2) 2 Anst. 529.

(3) 1 Sim. 385.

1839, though the question might have been raised upon motion. Though that consideration is not conclusive, yet it ought to weigh with the Court in a question of this kind. In *Langston v. Boylston* (4), Lord Eldon said he did not remember a case of such a bill ever coming to a hearing. Next, as to the supplemental bill; I incline to agree that the interest ought to have been made the subject of amendment; and that the supplemental bill was irregular, except so far as it can be sustained upon the other ground. Next, as to the third objection, which relates to the amount of the sum, namely, 6*l.* 16*s.* 6*d.* The case of *Smith v. Target* is certainly, to some extent, an authority; but not a conclusive one. But does the practice of the Court agree with it? The principle of an interpleading suit, is not to protect a party from a double liability, but a double vexation. If the circumstances shew that the plaintiff is liable to both parties, that is not a case for interpleader—*Craushay v. Thornton*. *Jew v. Wood* illustrates the same proposition. Assuming this to be the principle, how can the plaintiffs' right to file a bill, depend upon the amount of the sum claimed? for the expenses of a lawsuit do not depend on the amount. If the claimants think the subject worth pursuing at law, they cannot complain of the holder for filing his bill. I cannot, therefore, feel satisfied, that the practice of the Court is such as the argument supposes it. If it is necessary to decide the point, this case is distinguishable from *Smith v. Target*, on the ground, that the 6*l.* is part of a larger demand; provided this can be shewn, that the plaintiff was not bound to bring it into contest in the original suit. The objection is, that it ought to have been in the original bill, and that therefore the supplemental bill is bad as far as regards this point. This involves a question of costs only. My opinion of the supplemental bill, as a question of strict practice, is in favour of it. The plaintiffs were bound to bring into contest whatever fund came into their hands before the decree, upon which the decree ought to operate; nor can I doubt but that the omission to do so would have formed a ground of objection at the hearing. If, from the proceedings, I could believe that a wilful

disregard of expense to the other parties could be imputed to the plaintiffs, I should take the same course as in *Dyson v. Morris* (*supra*, 241), and throw upon the plaintiff the excess of costs. But there is no ground for such imputation. The 6*l.* 16*s.* 6*d.* had not, in fact, been received at the time of the original bill; and I do not know in what situation the sum was at the time of filing the original bill; nor can I hold that the plaintiffs were obliged to charge themselves with a sum not yet received. I cannot, therefore, charge them with irregularity. The plaintiffs must, however, pay the costs of the evidence gone into, and the costs of the affidavit upon which the original injunction was obtained, except so much as consists of the usual affidavit. The plaintiffs must also pay the costs of the motion for the injunction in the supplemental suit. At the time of filing the supplemental bill, the original injunction had been submitted to for more than six months, and no proceedings were threatened in respect of the 6*l.* received afterwards. I must consider that the plaintiffs have gone beyond what their own protection requires; and, therefore, that, in consequence of such vexation, the plaintiffs in that respect must be visited with costs.

WIGRAM, V.C. }
Mar. 2, 7. } RAIKES v. WARD.

Will—Construction—Trust.

A, by his will, gives all his monies, &c. to his wife, "to the intent, that she may dispose of the same for the benefit of herself and our children, in such manner as she may deem most advantageous;" and appointed his wife executrix. Semble—The wife does not take an absolute interest in the fund, but there is a trust for the children to some extent.

The relation of the parties, as parent and child, is an ingredient in determining the question, whether there is a trust or not.

G. Raikes, the testator, made his will, dated the 15th of November 1838, in the following words:—"This is the last will and testament of me, G. Raikes. I give to my dear wife Marianne, all my monies, securities for money, and personal estate

(4) 2 Ves. jun. 108.

whatsoever, to the intent that she may dispose of the same for the benefit of herself and our children, in such manner as she may deem most advantageous; and I make and appoint my said wife sole executrix of this my will."

The testator died on the 16th of January 1840, and his widow proved the will. The widow afterwards filed her bill, to obtain the opinion of the Court upon the construction of the will, claiming to be entitled absolutely to the clear residue, after the payment of the testator's debts. The children of the testator (defendants to the bill,) insisted that the widow was entitled for life only, with remainder to the children, in such manner as she should appoint.

Mr. Temple and *Mr. G. L. Russell*, for the plaintiff.—The widow has power to deal with the whole fund at her discretion, and the Court will not hold it to be a trust, except it is such a trust as the Court can execute. The Court could not here define any mode in which she should exercise the power, or say that she should not apply the greater part to her own use.

[WIGRAM, V.C.—It may be either a joint tenancy, or an estate for life in the widow, with remainder to her children.]

The question is, whether the testator meant to give her an absolute estate, trusting to her good feelings, or to make her a trustee.—*Curtis v. Ripon* (1); if no trust is declared, and none can be gathered from the will, it is an absolute interest—*Sprange v. Barnard* (2). Here, neither the property nor the persons to whom it is given are certain, nor can the Court ascertain the shares.

Robinson v. Tickell, 8 Ves. 142.

Benson v. Whittam, 5 Sim. 24.

The children are no direct objects of bounty, but only the occasion of bounty to the widow—*Hammond v. Neame* (3). In *Hamley v. Gilbert* (4), there were no words of gift; yet the legacy was held to be absolute in the mother, she maintaining her son during his minority. The moment the Court says it is a trust, it deprives the executrix of that discretion which the testator has reposed in her. In all the cases where it

has been held a trust, there was no discretion given—*Taylor v. Bacon* (5).

Mr. Boteler and *Mr. Faber*, for the children.—In *Hamley v. Gilbert*, the words were, "at her discretion;" and it was held a trust to some extent. When the purpose is expressed for which the fund is given, the Court will hold it a trust.

Wetherell v. Wilson, 1 Keen, 80; s. c.

5 Law J. Rep. (N.S.) Chanc. 235.

Blackwell v. Bull, Ibid. 176; s. c. 5

Law J. Rep. (N.S.) Chanc. 251.

Woods v. Woods, 1 Myl. & Cr. 401.

Hadow v. Hadow, 9 Sim. 438.

Jubber v. Jubber, Ibid. 503.

Blakeney v. Blakeney, 6 Sim. 52.

Cooper v. Thornton, 3 Bro. C.C. 96, 186.

Mr. Temple, in reply.

March 7.—WIGRAM, V.C.—This case was argued before I was aware that the accounts had not been taken; and, therefore, in point of regularity, I can make no decree as to the right. I do not mean to lay down any abstract rule, that I will never do it, for there may be cases where it is proper so to do. In this case, I think, to a certain extent, I may, without danger, state to the parties what my observations on the cases cited are, without decreeing any right. The bill is filed by *Mrs. Raikes*, the widow and executrix of the testator, praying the directions of the Court as to the construction of the will, and claiming to be entitled to the fund absolutely; and the defendants, the children, insist that a trust is created in their favour, and that *Mrs. Raikes* is not entitled to have the fund paid out to her. The course which appeared to me at the hearing to be most expedient was, that *Mrs. Raikes* might safely take a life interest in the fund, with power to apply as occasion arose. In support of the plaintiff's claim, it was argued, first, that a bequest to a person to enable him the better to accomplish a given duty was an absolute interest. Secondly, that a bequest to a person in terms which, according to the books, was precatory only, did not create a trust in favour of the objects of the testator's bounty, unless the amount of the fund was certain; and that where the legatee had power to dispose of the fund to an extent not defined, there is no trust, but a gift of

(1) 5 Mad. 434.

(2) 2 Bro. C.C. 586.

(3) 1 Swanst. 35.

(4) Jac. 354.

(5) 8 Sim. 100.

the fund absolutely; and that this case was within the scope of the cases deciding that. For the defendants it was argued, that the words of this will are not within the scope of the cases upon which the first proposition depends; that the words of the will clearly create a trust in favour of the children, unless the second proposition relied on by the plaintiff, prevents the Court from executing the trust. With respect to the second proposition, the defendants argued, that the relation on which the plaintiff and the children stood to the testator and to each other, is such that, according to the decided cases, the Court has power to measure the extent of the plaintiff's obligation to the children, so far as to say, that she has not power wholly to alienate the fund from them. The argument on both sides proceeded upon the principle, that it was neither intended nor apprehended, that the abstract right was set up hostilely to the interests of the children. Upon referring to the cases upon the subject, the first is *Burrell v. Burrell* (6), in which the testator gave to the wife all his real and personal estate, to the end she might give his children such fortunes as she should think proper, or they best deserve. One of the children, being dissatisfied, contended, that it was an illusory appointment. According to the report it is stated, that the Lord Chancellor gave his judgment at large, that the appointment was not illusory, but substantial. It is clear, that at that time a gift to a mother to the intent that she might provide for her children, was not an absolute gift to her, within that class of cases where property is given to buy a ring, a horse, &c. The next case is *Brown v. Casamajor* (7), where 7,000*l.* was given to the father, the better to enable him to provide for his younger children. The capital then was directed to be secured, the interest to be received by the father in the meantime, with liberty to the children to apply. It is quite clear, therefore, that at that time it was by no means considered that the relation of parent and child did not enable the Court to say, that the money so given was not to some extent a trust. In *Hamley v. Gilbert*, the Court held, that the children took some interest. In *Broad v. Bevan* (8), nothing

could be more indefinite than the words used; and though it is true, that the rule is, that where the amount given is not defined, the Court cannot execute the trust, yet where the relation of the parties is such as to enable the Court to intend a bounty, the Court will go a great way to effectuate the intention of the parties. There, Sir Thomas Plumer held, that the daughter had a beneficial interest, and referred it to the Master to ascertain the amount. *Wetherell v. Wilson* went beyond the previous cases. There, the interest was directed to be paid to the husband, the better to enable him to maintain the children of their marriage till their shares should become assignable; the husband assigned all his property to trustees, for the benefit of his creditors. The Master of the Rolls held that to be a trust for the benefit of the child; whether upon the ground of the relation of the parties I do not know; but in all the cases where the question has been between children and parents, and brothers and sisters, there has been a reference to the Master to inquire what was to be done, without laying down any positive rule. The case most relied on was *Woods v. Woods*; there the testator, after directing a sale of his property, said, "and if sold, all overflush to my wife, towards her support, and her family." It was argued, that there was no trust for the children, but that the wife took absolutely; the Lord Chancellor makes there some important observations upon that class of cases cited for the plaintiff, that "they only decide, that where a gift is made to a person, and a trust created in that person, the Court may safely and properly pay over the fund to the individual who is such trustee; but they are far from deciding, that the person to whom the payment is so made in that character, shall not be accountable for the fund to those for whose benefit the trust is created—*Hadow v. Hadow*, *Jubber v. Jubber*, *Chambers v. Atkins* (9), and *Foley v. Parry* (10). I merely give my opinion for the benefit of Mrs. Raikes, but I will not decide the point, as the accounts are not yet taken. I cannot but consider the cases cited as raising formidable obstacles to Mrs. Raikes claiming the absolute interest; but the Court will not deprive her of the

(6) Ambl. 660.

(7) 4 Ves. 498.

(8) 1 Russ. 511, n. (c).

(9) 1 Sim. & Stu. 382; a. c. 1 Law J. Rep. Chanc. 208.

(10) 5 Sim. 138.

power of appointing the property, but will sanction any reasonable distribution of the fund, when the other stage arises for doing that. There must be the usual decree for an account, with a view to clear the fund. Further directions and costs reserved.

WIGRAM, V.C. }
Mar. 17, 21. } CROCKETT v. CROCKETT.

Will—Construction—Trust.

J. C., by his will, directed that all his property should be at the disposal of his wife, for herself and children:—Held, that the wife was not entitled absolutely to the fund; but that the children took an interest in possession under the will. The fund was ordered to be brought into court, and the income to be paid to the wife during the infancy of the children, she maintaining them thereout; with liberty to the children to apply.

John Crockett, the testator, made his will, dated the 15th of March 1831, at Macao, in the following words:—

“Be it known to all men by these presents, that my last desire is, that all and every part of my property shall be at the disposal of my most true and lawful wife, for herself and children. In the event of any unforeseen accident happening to myself, which God forbid, I recommend the management of my affairs to my friends, A. and B.”

There were five children of the marriage, one of whom was born after the death of the testator, but who had since died. Administration *cum testamento annexo* was granted to the widow.

The widow, acting in the belief that she took an absolute interest under the will, executed a voluntary settlement, dated September 1837, whereby it was witnessed, that out of love to her children, she authorized Dent & Co., in whose hands the money was, to transfer 15,000*l.* to certain trustees, upon trust to permit her to receive the dividends for her life, with remainder to her children.

Mr. Russell, for the plaintiffs, contended, that either the wife and children took as joint tenants, under the will—

Wilde's case (1), or that the mother took a life estate, with remainder to the children.

Cook v. Cook, 2 Vern. 545.

Alcock v. Ellen, Freem. C.C. 185.

Oates v. Jackson, 2 Stra. 1172.

Buffar v. Bradford, 2 Atk. 220.

Jubber v. Jubber, 9 Sim. 503.

Hadow v. Hadow, Ibid. 438.

Cutbush v. Cutbush, 1 Beav. 184; s. c.

8 Law J. Rep. (N.S.) Chanc. 175.

Vaughan v. the Marquis of Headfort,

10 Sim. 639; s. c. 9 Law J. Rep.

(N.S.) Chanc. 271.

Blackwell v. Bull, 1 Keen, 176; s. c.

5 Law J. Rep. (N.S.) Chanc. 251.

Mr. Sutton Sharpe and *Mr. Goldsmid*, for the widow.—This is an absolute gift in the first place to the widow, at her disposal; the testator then goes on to declare the purpose for which he gives it her.

Robinson v. Tickell, 8 Ves. 142.

Hammond v. Neame, 1 Swanst. 35.

Cooper v. Thornton, 3 Bro. C.C. 96, 186.

Bushnell v. Parsons, Prec. in Chanc. 218.

Curtis v. Ripon, 5 Mad. 434.

If the wife does not take absolutely, she will take an estate for life, with remainder to her children. The words “to be at her disposal,” mean that she shall have a power to appoint after her death. Wherever it has been held, that the parent and children take as tenants in common, there have been no words in the will to indicate a succession of interests.

Morse v. Morse, 2 Sim. 485.

Ambler, Blunt's edit. 562, n.

Mr. Stinton, for the trustees of the settlement, who disclaimed, and said they never acted, asked to be dismissed, with costs.

Mr. Russell, in reply.—The cases cited for the widow have no application, according to the observation of the Lord Chancellor, in

Woods v. Woods, 1 Myl. & Cr. 401.

Benson v. Whittam, 5 Sim. 22.

Malim v. Keighley, 2 Ves. jun. 335.

Jeffery v. Honywood, 4 Mad. 398.

March 21.—WIGRAM, V.C.—The bill in this case is filed by the four children against the mother, insisting that they are entitled

jointly with their mother to the funds, and that the voluntary deed of trust did not bind them; praying the usual accounts, and a declaration of the rights of the parties. For the plaintiffs it was argued, that under the will of the testator, they took jointly with the mother, and that the deceased child's share survived to the others. For the defendant it was urged, first, that she took absolutely, or if not absolutely, then for life, with remainder to her children. Thirdly, that the children interested in the funds, included the children of a second marriage, if any such there should be. Fourthly, that if the trust deed was not altogether good, it was altogether void. The late case of *Raikes v. Ward* (2), which I had to consider, was somewhat similar to this. The cases to which reference was made were *Burrell v. Burrell* (3), *Brown v. Casamajor* (4), *Hamley v. Gilbert* (5), *Roberts v. Smith* (6), *Broad v. Bevan* (7), *Wetherell v. Wilson* (8), *Hadow v. Hadow*, *Jubber v. Jubber*, *Woods v. Woods*, and *Chambers v. Atkins* (9). In *Woods v. Woods*, Lord Cottenham explained the cases like *Robinson v. Tickell*, in which the whole property had been committed to the parent, by saying, that the Court in such cases only meant to decide, that the fund might safely be committed to the care of the parent. In the present state of the authorities, and the state of the family, I think the safest course would be, to have the whole fund brought into court; to decree, that the children take an interest in possession under the will; that the trust deed is not binding upon them;—secondly, to give the whole income to the mother during the infancy of the children, she maintaining them thereout, with liberty to the children to apply. At present, I can only negative the absolute claim of the widow, and reserve my opinion upon any other application till it is made.

(2) See preceding case.

(3) Ambl. 660.

(4) 4 Ves. 498.

(5) Jac. 354.

(6) MS.

(7) 1 Russ. 511, n.

(8) 1 Keen, 80; s. c. 5 Law J. Rep. (n.s.) Chanc. 235.

(9) 1 Sim. & Stu. 382; s. c. 1 Law J. Rep. Chanc. 208.

K. BRUCE, V.C. }
May 5. } MANSON v. BURTON.

Practice.—Bankrupt—Dismissal of Bill.

Motion by a bankrupt defendant, that the plaintiffs might, within a limited time, file a supplemental bill against his assignees, or that the bill might be dismissed, as against him, with costs,—Held, to be irregular, and refused.

The costs of the motion were not given against the bankrupt, on the ground of his being a bankrupt.

Mr. Rogers moved, on the part of a defendant in this suit, who had become bankrupt, that the plaintiffs might, within a limited time, file a supplemental bill against his assignees, or that the bill might be dismissed, as against him, with costs. In support of this motion, he cited—

1 *Smith's Chanc. Prac.* 328.

Monteith v. Taylor, 9 Ves. 615.

Rhode v. Spear, 4 Madd. 51.

In answer to a question put by Knight Bruce, V.C., he admitted that the cause was not in such a state that the defendant could move to dismiss the bill for want of prosecution.

Mr. Toller, contra, contended, that the motion was irregular, and ought to be refused, and, although the defendant was a bankrupt, refused with costs.

Knight Bruce, V.C. (after conferring with the registrar).—I quite agree with what was laid down in *Monteith v. Taylor*; and, if the cause is in such a state that the defendant may move to dismiss the bill for want of prosecution, he is quite at liberty to do so. This is not the motion now before me. Such a motion I never heard of, and it appears to me to be quite irregular, in which view I am confirmed by the registrar. The motion must be refused, and had the defendant not been a bankrupt, I should have refused such a motion with costs. I shall not, however, give costs against a bankrupt. Reserve the costs till the hearing.

WIGRAM, V.C. }
 March 21, 22; } MACFADDEN v. JENKINS.
 April 15. }

Trust—Parol Declaration.

A, being a creditor of B. to the amount of 500l., gave a verbal direction to B. to hold that sum for the benefit of C; and B, in part execution of the trust, advanced 10l., part thereof, to C. Upon the death of A, his administrator brought an action against B. to recover the money. C. then filed a bill against B. and the administrator; and it was held upon motion, that C. was entitled to an injunction against the administrator to stay the proceedings at law.

Semble—This was prima facie a valid declaration of trust in favour of C.

The bill stated, that the defendant Jenkins, and W, the testator, were upon intimate terms for many years past, and were in the habit of accommodating each other with loans for short periods; that on the 12th of February 1840, Jenkins borrowed of the testator the sum of 500l., and gave as a security a crossed cheque; that W, at that time being in bad health, was desirous of making a provision for the plaintiff, and on the 21st of May 1840 gave directions to B. to go to Jenkins, and tell him to hold the 500l. in trust for the plaintiff; that shortly afterwards, Jenkins, on the application of the plaintiff, paid to her 10l., in part performance of the said trust of the 500l.; that shortly after the death of the testator, which took place on the 22nd of December 1841, the defendant S. W, who was the brother and administrator *cum testamento annexo* of the testator, commenced proceedings at law to recover the 500l. in the hands of Jenkins. The bill was filed by the plaintiff against Jenkins and S. W, praying that it might be declared that the 500l. in the hands of Jenkins was subject to the trust in her favour, and for an injunction to restrain the proceedings at law. The plaintiff now moved for the injunction. In support of the motion, there was an affidavit of B, who deposed that he was employed by the testator to carry, and did carry, this message to Jenkins, and an affidavit of Jenkins, who stated, that he received such a message through B, and that the testator never afterwards asked for the 500l., or attempted to exercise any controul over the same; that

shortly after he accepted the trust, the plaintiff applied to him for 10l., in part payment of the 500l., and that he immediately, in compliance with such request, paid the same to her; and that he made such payment without any interference on the part of the testator. The plaintiff also made an affidavit, that the testator communicated to her the message he had sent to Jenkins, and told her that Jenkins would hold the money for her benefit; and that the deponent, in consequence, shortly afterwards made the application to Jenkins for 10l., part thereof.

Mr. Sutton Sharpe and Mr. G. L. Russell, for the motion.—There is nothing in the Statute of Frauds that makes it necessary that a declaration of trust of personal estate should be in writing.

Fordyce v. Willis, 3 Bro. C.C. 587.

Nabb v. Nabb, 10 Mod. 404.

Bayley v. Boulcott, 4 Russ. 345.

Benbow v. Townsend, 1 Myl. & K. 510;

s. c. Law J. Rep. (n.s.) Chanc. 215.

The case of *Wheatley v. Purr* (1) is very analogous to the present case.

[WIGRAM, V.C.—It is very difficult to reconcile that case with *Jones v. Edwards* (2).]

Consideration is immaterial, if the trust is actually created:—

Ex parte Pye, and *Ex parte Dubost*, 18 Ves. 140.

Collinson v. Pattrick, 2 Keen, 123.

Mr. Wakefield and Mr. Kenyon, contra.—If it is a valid absolute disposition of the money, it is a gift of the debt to the plaintiff, and no trust. To make this case analogous to *Wheatley v. Purr*, the testator must have constituted himself a trustee, and not Jenkins.

[WIGRAM, V.C.—The question then would be, whether S. W. is not a trustee.]

When there is no consideration, and no trust executed, the plaintiff cannot come to this court to have it executed. The testator could have recalled this direction whenever he pleased—*Taylor v. Lenday* (3). If the legal title was not divested out of the testator, the Court cannot fasten a trust upon the money in the hands of Jenkins, for the legal right must be in the party who is to be declared a trustee. It is analogous to

(1) 1 Keen, 551; s. c. 6 Law J. Rep. (n.s.) Chanc. 195.

(2) 1 Myl. & Cr. 226.

(3) 9 East, 49.

the case of a cheque given by a man in his last illness, and not presented till after his death.

Tate v. Hilbert, 4 Bro. C.C. 286; s. c. 2 Ves. jun. 111.

Ex parte Pye and *Ex parte Dubost*.

Coleman v. Sarrel, 3 Bro. C.C. 12.

Pulvertoft v. Pulvertoft, 18 Ves. 84.

Ellison v. Ellison, 6 Ves. 656.

Mr. Sutton Sharpe, in reply.—If a party has made a positive declaration of trust, the Court will carry it into effect, though it is without consideration. But the Court will not imply a trust without consideration. In *Bailey v. Boulcott*, the plaintiff had not declared herself a trustee, but had only expressed an intention to do some act, which would have constituted her such. *Wheatley v. Purrr* was cited without disapprobation in *Godsall v. Webb* (4).

March 24.—WIGRAM, V.C., after stating the facts of the case, proceeded as follows:—The personal respectability of Jenkins and B, who, with the plaintiff, have made affidavits in support of the motion, is admitted at the bar, and their testimony in support of the plaintiff's claim is so direct and positive, that I could not say that the plaintiff has not made out her case, if the facts deposed to by them entitle her to the equity she claims. The evidence on the part of the defendant S. W. tends to throw some degree of doubt upon the evidence for the plaintiff, which, indeed, was all that was to be expected. In this state of the evidence, according to the usual course of the Court, I shall reserve my judgment upon the facts of the case, and direct my judgment upon this motion to the other points. First, it is sufficiently clear, that the trial of the pending action will decide nothing, in this case, which this Court would deem conclusive against the plaintiff. Secondly, it is clear that in this court, inasmuch as the directions, by which the plaintiff claims, were not founded in value, the Court will not lend its aid to perfect the title of the plaintiff, unless in the lifetime of the testator there were transactions which are binding on the administrator. Thirdly, I think it may be safely stated as an abstract proposition, that if the testator had declared himself a trustee

of the debt for her, she would have an equity against the administrator. Lastly, I think it is clear upon the authorities, as an abstract proposition, that in the case of personal property there may be a good declaration of trust without writing. The first of these propositions depends upon the accuracy of the others. The second is clear from the cases of *Colman v. Sarrel*, *Ellison v. Ellison*, *Adams v. Claxton* (5), *Antrobus v. Smith* (6), *Cotteen v. Missing* (7), *Pulvertoft v. Pulvertoft*, *Ex parte Pye* and *Ex parte Dubost*, *Edwards v. Jones*, and the late case of *Dillon v. Coppin* (8), before Lord Cottenham. The third point depends upon *Ex parte Pye* and *Ex parte Dubost*, which were followed by the Master of the Rolls in *Wheatley v. Purrr* and *Collinson v. Patrick*, to which may be added, *Sloane v. Cadogan* (9), and the principle in the case of *Flower v. Marten* (10). The last point is sufficiently established by the cases cited at the bar. Such is the state of the case as to the points made at the bar, and I have thought it right to mention the above authorities, in order that, if the parties appeal, the principle established by the cases referred to, may be fully considered. There is a difficulty in reconciling all the cases that have been cited, which, perhaps, may be explained, on the principle that a declaration of trust is a complete transaction, and that the Court need not look beyond the declaration of trust, in order that it may be in a position to enforce it; whereas, in an agreement to assign, or an attempt to assign in an informal manner, the origin of the transaction must be inquired into; and where there is no valid consideration, the Court, on general principles, will refuse to perfect it. There is a strong analogy in the case of suits to enforce a demand arising out of illicit transactions between the parties. If, in such cases, the Court finds an account, or any act done by the party upon which the Court can proceed, without investigating the origin of the demand, it will do so—*Davenport v. Whitmore* (11). But the form

(5) 6 Ves. 235.

(6) 12 Ibid. 39.

(7) 1 Mad. 176.

(8) 9 Law J. Rep. (N.S.) Chanc. 87.

(9) 3 Sugd. Vend. & Pur. App. 27.

(10) 2 Myl. & Cr. 459; s. c. 6 Law J. Rep. (N.S.) Chanc. 167.

(11) Ibid. 177; s. c. 6 Law J. Rep. (N.S.) Chanc. 58.

(4) 2 Keen, 113; s. c. 7 Law J. Rep. (N.S.) Chanc. 173.

of the transaction may be such as to oblige the Court to go into the origin of the transaction. It is unnecessary to pursue this question further in the present stage of the cause. I am so much pressed by the modern authorities in which a declaration of trust has been held sufficient, that I must, upon this motion, make the order asked. But it was said, that I could not, upon this motion, say that I would reserve the question of evidence, without deciding that the case at the Rolls was erroneously decided. I mean to give no opinion as to the ultimate chance of the plaintiff's success. Upon this motion I cannot venture to form a conclusive opinion, for the evidence here is not so full as it was in *Wheatley v. Purr*. I have this further observation to make, that the plaintiff may consider how she can relieve herself of this formal difficulty. The bill prays, that Jenkins may be declared a trustee. The question is, whether it should not have prayed that the administrator and Jenkins, or one or the other of them, had become trustees. The observations of Lord Cottenham, in *Edwards v. Jones*, may make that material. Injunction granted, and the money to be brought into court.

WIGRAM, V.C. { M'INTOSH v. THE GREAT
April 15, 20. { WESTERN RAILWAY COM-
PANY.

*Witness, Examination de bene esse—
Computation of Time—Intervening Sunday.*

In computing the three days' notice of an examination of a witness de bene esse, an intervening Sunday will be reckoned; the reason for its being excluded from the computation in a notice of motion not existing in this case.

On Saturday the 19th of March, the plaintiff had obtained an order on a motion of course to examine a witness *de bene esse*, and the order was served on the defendant's clerk in court the same day. The witness was examined on the 22nd of March following. The defendant now moved, that these depositions might be suppressed: first, on the ground, that the order ought to have been obtained upon a motion with notice;—secondly, that the affidavit upon which the

order had been obtained, should have stated the particulars as to which the witness was to be examined;—thirdly, that three clear days' notice of the examination had not been given to the defendants, so as to afford them the opportunity of cross-examining the witness.

Mr. Girdlestone and Mr. Stephens, in support of the motion, as to the first point, cited 2 *Dan. Ch. Prac.* 541.

[WIGRAM, V.C.—Can I upon this motion decide upon the regularity of the order of the 19th of March?]

As to the second point:—

2 *Dan. Ch. Prac.* 547.

Pearson v. Ward, 1 Cox, 177; s. c.

2 Dick. 648.

Thirdly, it was contended, that the intervening Sunday being a *dies non*, there was not due notice.

2 *Dan. Ch. Prac.* 548.

Loveden v. Lord Milford, 4 Bro. C.C. 540.

Hankin v. Middleditch, 2 Ibid. 640.

Tomkins v. Harrison, 6 Mad. 315.

Mr. Sutton Sharpe and Mr. Walpole, contra.—Upon this motion, it must be assumed that the order of the 19th of March was regularly obtained. In this case, due notice was given of the intention to examine. In the computation of time, a Sunday is always reckoned, except it should happen to be the last day. The cases all assume that an *intervening* Sunday is to be reckoned.

2 *Dan. Ch. Prac.* 348.

Angell v. Wescombe, 1 Myl. & Cr. 48.

Milburn v. Lyster, 5 Sim. 565.

Manners v. Bryan, Ibid. 147; s. c. 1 Myl. & K. 453.

Gilb. For. Rom. 140.

April 20.—WIGRAM, V.C.—As this motion does not seek to discharge the order of the 19th of March, that order must now be taken to be regular. In *M'Kenna v. Everitt* (1), it was decided that an *ex parte* order for the examination *de bene esse* of a soldier, under orders to proceed abroad, was regular; and Lord Langdale's decision in that case is in accordance with the practice as laid down in *Gilb. For. Rom.* 140. As to the question, whether an *intervening*

(1) 2 Beav. 188; s. c. 9 Law J. Rep. (N.S.) Chanc. 98.

Sunday should be reckoned in the computation of the three days, the practice is far from being settled. In some of the cases a difference appears to exist as to the proper method of computation—*Moothan v. Waskett* (2), *Manners v. Bryan, Bullock v. Edinton* (3). It has certainly always been my impression, that Sunday was to be reckoned, except it should fall on the last day; and in fact, the points in controversy in the cases of *Boys v. Morgan* (4), *Milburn v. Lyster*, and *Angell v. Wescombe*, could not have arisen, except it had been assumed that the intermediate Sunday was to be counted. At law, the Sunday is counted—*Creswell v. Green* (5), *Wather v. Beaumont* (6), 1 *Arch. Prac. K.B.* 93. But it may be said, that Sunday is not computed in a notice of motion—*Maxwell v. Phillips* (7). But is that at all analogous to the present case? The reason for that in a notice of motion, is, that a party must be prepared to meet the motion by a certain day; and, if he is not then prepared, the motion is granted. That reason does not exist here. The object of the notice is to give the party an opportunity of cross-examining the witness, which opportunity is not lost by the party not being ready at the precise day. I am of opinion, therefore, that the intervening Sunday must be reckoned, assuming that the three days' notice of the examination is requisite.

Motion refused, with costs.

WIGRAM, V.C. }
 April 27, 28, 29; } COOKE v. FRYER.
 May 7.

Marriage—Infant—Settlement—Proposals before Master—Substituted Settlement.

Upon a treaty of marriage between F. and the daughter of a lunatic, a petition was presented under the Marriage Act, for the consent of the Lord Chancellor, and a reference was made to the Master as to the propriety of the marriage. Proposals for a settlement

were carried in, supported by the affidavit of F, that he had agreed to settle 20,000l. of his own money, and the future property of the lady. The Master's report of the propriety of the marriage was confirmed. F. afterwards wished to substitute other property of greater value for the 20,000l., and being advised that he could not do so without the leave of the Court, he caused other articles of marriage to be drawn up and executed, and the parties shortly afterwards were married by banns. Upon a bill by the plaintiff as a trustee to enforce the settlement,—Held, that the fact of the marriage taking place by banns, and not by licence, did not relieve F. from the obligation of substantially performing the contract which was evidenced in writing by the proposals and affidavit.

Sed quære—Whether, by carrying in the affidavit, F. had made a contract with the Court, which he would be bound literally to perform.

Semble—The Court would look at the bona fides of the substitution, and direct a reference as to that.

In the drafts of the articles founded on the proposals, and also in the second articles, the plaintiff was named as a trustee, and had accepted the trust, and was recognized in that character before and after the marriage:—Held, that he had sufficient interest to sustain the suit, though he had not executed any of the deeds.

In 1838, there was a treaty of marriage between the Rev. — Fryer and Miss Turner, then an infant, and who, on the death of her father, Sir G. Page Turner, who was *non compos*, would become entitled to considerable property, and it was then agreed between Mr. Fryer and Lady Turner, the mother of the lady, that Mr. Fryer should settle 20,000l. of his own money, and should covenant to settle all the property that he should at any time become entitled to in right of his wife, in such manner as Lady Turner should approve. On the application of Lady Turner, the plaintiff consented to become a trustee of the intended settlement, and was accordingly so named in the drafts that were prepared. A petition was presented to the Court under the provisions of the Marriage Act, 4 Geo. 4. c. 76. s. 17, and an order made thereon, referring it to the Master to inquire and state whether the

- (2) 1 Mer. 243.
- (3) 1 Sim. 481.
- (4) 9 Ibid. 262.
- (5) 14 East, 537.
- (6) 11 Ibid. 271.
- (7) 6 Ves. 146.

proposed marriage was proper. On the 4th of July, a state of facts was carried in before the Master, stating the agreement for the settlement, which was supported by the affidavit of Fryer, that he had engaged to pay to the trustees of the settlement 20,000*l.*, to be settled in trust for himself, his wife, and children, in such manner as Lady Turner should approve of, and to covenant to settle upon the like trusts all the property Miss Turner might become entitled to. On the 2nd of August, the Master reported it a proper marriage, and that report was confirmed. It appeared, that afterwards Mr. Fryer was desirous of settling other property in lieu of the 20,000*l.*, but was advised that he could not alter the terms of the settlement without the leave of the Court. It was then determined, that the marriage should take place by banns; and a second set of articles were prepared at Southampton, dated the 21st of August 1838, and purporting to be made between Mr. Fryer of the first part, Miss Turner of the second part, Lady Turner of the third part, and Sir W. T. E. Fryer, A. B, and — Cooke of the fourth part, and were executed by Miss Turner and Mr. Fryer; by which certain leasehold and copyhold estates, rent-charges, &c., were substituted for the 20,000*l.* mentioned in the previous agreement and the Master's report, being in the whole of greater value than 20,000*l.* On the following day the marriage took place. On the 26th of October following, the solicitors who prepared the second settlement wrote to the plaintiff and the other trustees therein named, stating that in August last they had prepared a settlement on the marriage of Miss Turner, and proceeding thus:—"You are one of the four trustees of the intended settlement, and as such, are parties to these articles." "There are certain acts which it is proper that the trustees should now call upon Mr. Fryer to do, and he has signified his wish to perform them. We hope, therefore, for your authority to carry the articles into effect." On the 6th of November 1839, this bill was filed by the plaintiff, to carry out the agreement proposed in Mr. Fryer's affidavit before the Master, or of the subsequent agreement of the 21st of August. To this bill, Mrs. Fryer was made a co-plaintiff, but after the cause was set down she attained twenty-one, and applied to

have her name struck out as co-plaintiff, and to be made a defendant. On the 23rd of November, Mr. Fryer's solicitor wrote to the plaintiff, saying that he had Mr. Fryer's instructions to complete the settlement as quickly as possible, and expressed a hope that the plaintiff would take no further steps in the suit.

The cause now came on, on bill and answer.

Mr. J. Russell and *Mr. Daniell*, for the plaintiff.—The defendant Fryer, by petitioning the Court under the Marriage Act, and carrying in the state of facts, and making those affidavits before the Master, has entered into a contract with the Court, which he will be compelled specifically to perform, and cannot be heard to say, because he has been married by banns, that this contract is to have no effect—*Luders v. Anstey* (1).

Mr. Teed and *Mr. Wilcock*, for Mr. Fryer, who answered separately, insisted that the affidavits and proposals before the Master were no sufficient writing, within the Statute of Frauds, so as to give the plaintiff a right to sue, his name not being mentioned in the proposals before the Master. That there was nothing to hinder the contracting parties from altering the terms.

[WIGRAM, V.C.—It is a question whether a bargain has not been made with the Court on behalf of unborn infants.]

Mr. Fryer has a right to refer the marriage to the banns, and as it did not take place under the sanction of the Court, the consideration for the proposals before the Master fails; and Mr. Fryer, if he thought fit, might abandon that settlement altogether. If he had used the permission of the Court, there would have been a complete contract. It is competent to a party to abandon an order he has obtained.

[WIGRAM, V.C.—That depends upon the question for whose benefit the order is made.]

Mr. Sharpe, for Mrs. Fryer.—The reference to the Master as to the propriety of the marriage, is merely as to the character and condition in life of the husband: and not as to the quantum of the settlement to be made. This is not the case of a ward of court. The Court, at any rate, will only look to see if a substantial settlement has been made with the approbation of the mother.

(3) 4 Ves. 501.

Mr. Koe and Mr. Webster, for the other trustees.

Mr. J. Russell, in reply.

WIGRAM, V.C.—I cannot accede to the proposition on the part of Mr. Fryer, that he was not bound by the proposals carried into the Master's office, or that the order of reference was only as to the person, and not to the property. Suppose a party makes a proposal of marriage, and asks a judicial declaration that the marriage is proper, states his intention of making a settlement, the Master reports in his favour, and the marriage takes place, and a child is born, and that child files a bill to enforce the settlement, and it turns out that no settlement is made, and the husband is advised that he is under no obligation to make a settlement: in that simple case, without drawing in aid the proposition, that it is a contract with the Court, still there being evidence in writing of the husband that he had made such a contract, and that the marriage took place on the footing of that contract, I am satisfied that the Court would say that the contract should be enforced. And I cannot consider that there is any difference between the case of a party coming to the Court, and a party making the contract with the family of the lady. A contract required by the Statute of Frauds to be evidenced in writing, cannot be of less weight, because it is carried into court for the purpose of obtaining the consent of the Great Seal. But the case does not stand on that footing. If an agreement in writing were made out of court, and before the marriage, the parties to the agreement agreed to vary the terms, and the marriage then took place on that footing, it would be an effectual substitution. I am not at present prepared to say, that the mere fact of having applied to the Court for a consent, which was not acted upon, would prevent the family from varying the agreement and substituting another. It is the *bona fides* of the transaction that is to be looked at. Suppose a lady of large property, and her friends suggest the propriety of applying to the Great Seal, the application made, and the proposal approved of by the Master and confirmed by the Court, and the marriage to have taken place. Upon the husband being called upon to execute the contract, it is found that he has taken means to get a

marriage by banns, to which the attention of the family was not called; and now, because he did not apply for a licence, he insists that the contract is void. The Court would never allow him so to act. The question here would be, whether the second articles were equally beneficial. But before I can enter into the question, whether the settlement is proper, or whether I have power to interfere, I must decide whether the plaintiff has sufficient interest to sustain the suit, and for that purpose I must look into the pleadings.

April 7.—WIGRAM, V.C.—The first point is, as to the plaintiff's interest to sustain the suit. Upon that, I am of opinion, that it is not competent to the defendants to raise the objection. It is alleged by the answer; and admitted, that the plaintiff was requested to be a trustee, and consented to act; that he was named as such in both sets of articles, and after the marriage recognized in that character; the letters that passed between the parties after the marriage, are quite decisive, for the purposes of this suit, to shew that the plaintiff had accepted the trusts of the second articles also. The next point is, whether I am to consider the second articles as an addition to or in substitution of the first; but it is quite impossible to say, that they are anything else than a substitution. The next point is, what was the effect of that which took place in the Master's office? I retain the same opinion that I expressed before, that it is not necessary to say that it is a contract with the Court; but it is sufficient to say, that it is an agreement which will satisfy the Statute of Frauds. The suggestion is not that the agreement was in consideration for the consent to marry by licence, but in consideration of marriage generally. In point of fact, the marriage took place by banns; and then comes the question, whether the marriage having been so celebrated, it is not competent to the parties to vary the proposals. Suppose no application to the Great Seal, but that Lady Turner had come to this agreement with Mr. Fryer, the terms might have been varied before the marriage took place; and if the marriage had taken place upon those altered proposals, the transaction would have been good. The question is, whether the circumstance of proposals having been carried in

before the Master, can alter the question. Looking at the dates, and seeing how quickly the marriage followed upon the articles, and there being no doubt that the second articles are more beneficial, I hope that the parties will agree to refer it to the Master, to inquire and state whether the second settlement ought to be confirmed, for if there should be a child born, there will be ample food for litigation afterwards. If the parties do not choose to take that course, I must first refer it to the Master to inquire and state under what circumstances the second settlement was made. If the Court had been looking only at the interest of the plaintiff and Mr. and Mrs. Fryer, as the trustee has brought this case before the Court upon bill and answer, I must have taken the answer to be true, but I ought not to do that, as unborn infants have an interest in the question, and I should be receiving the evidence of Mr. and Mrs. Fryer, in a case where it is entirely in their own favour.

Refer it to the Master to inquire under what circumstances the alterations in the articles took place, with liberty to state special matter.

WIGRAM, V.C. }
 April 26; } BOWER v. COOPER.
 May 2, 27. }

Vendor and Purchaser—Specific Performance—Consideration—Annuity—Costs—Improper Defence.

The defendant fixed with the costs of an improper defence, and which was false within his own knowledge, before the ultimate decision of the cause; taxation and payment reserved.

Quære—Whether on a bill by a purchaser for specific performance, the Court will inquire into the adequacy of the consideration, where the estate has been sold for a life annuity.

This was a bill by the purchaser against the vendor, for specific performance. It appeared that the defendant was possessed of a number of small cottages at C, which were let to weekly tenants, and produced an annual income of 20*l.* a year. On the 19th of January 1841, the defendant entered

into a treaty with the plaintiff to sell these cottages to the plaintiff, for an annuity of 30*l.* for his life, to be secured on the property, the defendant being then upwards of sixty years of age. That on the 22nd of January, the parties went together to the office of D, a solicitor, at C, and signed a contract for sale upon the terms above mentioned. The defence set up by the answer was, that from the 19th to the 22nd of January, the defendant was in a state of intoxication, through the procurement of the plaintiff, and that the consideration was inadequate. The evidence on the part of the plaintiff proved, that the defendant was sober at the time of signing the contract.

Mr. Sutton Sharpe, for the plaintiff.—In the absence of fraud or surprise, the inadequacy must be extreme, *i. e.* such as would shock the conscience, to prevent the Court enforcing the performance of the contract.

Coles v. Trecothick, 9 Ves. 234.

White v. Damon, 7 Ves. 30.

Ex parte Latham, *Ibid.* 35.

But the consideration is *bonâ fide* according to the government tables of granting annuities. The charge of intoxication is not proved.

Mr. O. Anderdon and *Mr. James*, for the defendant.—Inadequacy of consideration is ground for refusing specific performance—*Day v. Newman* (1). At all events, if an uncertain consideration, as a life annuity, is given, the Court will enter into the adequacy of the consideration.

1 *Vend. & Pur.* 440, 10th edit.

Pope v. Root, 7 Bro. P.C. 184.

Mortimer v. Capper, 1 Bro. C.C. 156.

Jackson v. Lever, 3 *Ibid.* 605.

Mr. Sutton Sharpe, in reply.—The cases cited to support the proposition of Sir E. Sugden, as to a life annuity, are all cases where the vendor died before anything was received, and before the contract was completed.

May 27.—WIGRAM, V.C.—The bill was filed to enforce specific performance of an agreement, and various defences were set up; one of which was, that the consideration for the purchase was so inadequate,

(1) 2 Cox, 77.

that the Court would not enforce it; and another defence was, that the defendant was intoxicated at the time of signing the agreement. I was of opinion, that there was no defence on the ground of intoxication, and the case turned wholly on the ground of inadequacy of consideration, which was referred to the Master. The plaintiff's counsel then asked the costs of so much of the suit as were occasioned by the defence set up of intoxication. It is clear, though a doubt has been suggested as to the practice, that the Court must have jurisdiction, because it has often been exercised. If the defendant states an irrelevant case by his answer, the plaintiff has an opportunity of expunging it for impertinence. If it is not apparently impertinent, there may be no way of expunging it; if it should turn out false, it is extraordinary that he should be able to burden a party with a defence which he knows to be false. Then there must be some such jurisdiction as this which is claimed. There is a class of cases which strongly confirms this view of the case, that is, where after answer, the plaintiff amends his bill by striking out a material part of his case, and the defendant then applies to the Court, and is allowed his costs of that part of the case which the plaintiff originally made, and which he afterwards withdrew; it does not follow that the Court always gives the costs, though it exercises a jurisdiction to do it. That case is not distinguishable from this in principle. The earliest case in which this jurisdiction was hinted at, is *Deggs v. Colebrook* (2). In *Bullock v. Perkins* (3). Lord Hardwicke went largely into the case. In *Watts v. Manning* (4), the Court did the same thing. In *Mounsey v. Burnham* (5), I was quite satisfied that the Court was in the habit of indemnifying a party in respect of such costs, though it was there refused, there being no special application before me. Upon principle and the analogy of the cases, it must be so; but there are two decided cases, where the Court has done it—*Wright v. Howard* (6), where Sir J. Leach, in dismissing the bill with costs, excepts so much of the costs as was occasioned by the sug-

gestion of fraud. In *Crutchley v. Gardiner* (7), Lord Cottenham ordered the defendant to pay to the plaintiff the costs of such of the depositions as related to the insanity of the party. There the costs were given of a defence improperly set up; whereas, if there had been no jurisdiction, the Court would not have done it. But it was objected by the defendant, first, that I am not now disposing of the costs of the cause at large; and, next, that if these special cases were acted upon too freely, the consequence would be, that in every case there would be a long discussion whether the costs were not distinguishable upon this ground. With respect to the first point, I should have yielded to the defendant's reasoning, were there not a decree made, which supposes that I have already disposed of that part of the case. As to the second point, I certainly should act upon the principle; but, unless the case was distinguishable from the general merits of the cause, and the costs were substantially different, I would not burden the party with the costs of a separate taxation. In this case, in the view I have taken, this defence is not only distinguishable, but a great part of the expense has been occasioned by the attempt to prove the intoxication, which was false within the knowledge of the party. Therefore, I consider myself justified in acting as the Court has done before. Declare that the plaintiff is entitled to so much of the costs as have been occasioned by the defence of intoxication, but reserve both the taxation and payment. There is no reason for a separate taxation; and with respect to the payment, there may be eventually a set-off as to costs to be paid by the plaintiff.

K. BRUCE, V.C. }
May 25. } MARKE v. LOCK.

Practice.—23rd, 24th, and 25th New Orders of August 1841.

A defendant was served in Ireland, on the 2nd of February, with a copy of the bill, under the 23rd New Order of 1841. An order for entering a memorandum of service, under the 24th New Order, was obtained on

(2) 1 Atk. 396.

(3) 1 Dick. 110.

(4) 1 Sim. & Stu. 421.

(5) Not reported.

(6) 1 Sim. & Stu. 205.

(7) Not reported.

the 10th of February, and such entry shortly after made. The defendant entered a common appearance on the 14th of April. Motion, that this appearance should be vacated, refused with costs.

Whether a defendant resident out of the jurisdiction can properly be served with a copy of the bill under the 23rd New Order—quære.

Whether it is necessary to serve a defendant with the order for entering a memorandum of service under the 24th New Order—quære.

What is the meaning of the "time limited by the practice of the Court," mentioned in the 25th New Order—quære.

Whether the time is to be reckoned from the service of a copy of the bill, or the date of the order for entering a memorandum, or the entry of the memorandum, or the service of the defendant with the order, if necessary—quære.

The bill, which related to copyhold hereditaments in Somersetshire, prayed, that the defendant, Elizabeth Lock, on being served with a copy of the bill, might be bound by all the proceedings in the cause. The bill was filed on the 14th of January 1842. Elizabeth Lock, who resided in the county of Meath, in Ireland, was served, at her residence, with a copy of the bill, on the 2nd of February. On the 10th of February an order was obtained that a memorandum of service should be entered pursuant to the 24th New Order of August 1841, and a proper entry of such memorandum was made shortly after. On the 14th of April Elizabeth Lock entered an appearance in the common form.

Mr. Swanston and Mr. Kinglake now moved, that the appearance entered by Elizabeth Lock might be vacated, or that the cause might be proceeded with in the same manner as if she had not appeared. By the 25th New Order it is directed, that when a defendant shall have been served with a copy of the bill, and a memorandum of such service shall have been duly entered, and such defendant shall not "within the time limited by the practice of the Court for that purpose" enter an appearance in common form, the plaintiff should be at liberty to proceed with the cause as if such

party so served were not a party thereto; and that the party so served should be bound by the proceedings in the cause. By the practice of the Court the time limited for a defendant to appear to a bill is, four days after the service of the subpoena in a town cause, and eight days after such service in a country cause. The service of the copy of the bill must have been intended, by the framers of the 25th New Order, to have been substituted for the service of the subpoena. The defendant, having been served on the 2nd of February with a copy of the bill, and not having appeared within eight days after, cannot be allowed now to appear to the bill, and become a party to it, in the common form.

Mr. Teed and Mr. Freeling, contra.—The meaning of the "time limited by the practice of the Court," is left in the 25th New Order in ambiguity. However that may be, it is clear that in this case there is no time limited by the practice of the Court for the appearance of the defendant. If this defendant had been served with a subpoena, she must have been served under the provisions of the 2 Will. 4. c. 33, or the 4 & 5 Will. 4. c. 82, by which, service upon defendants not within the jurisdiction of the Court is directed in certain cases to be good service. No particular time is limited by the practice of the Court for appearance of defendants so served; that time is left to the discretion of the Court, to be exercised in each particular case.

KNIGHT BRUCE, V.C.—It is incumbent on the party moving, to satisfy the Court, that the defendant was not authorized to enter an appearance in the common form. If a copy of the bill had been served on a party within the jurisdiction, the question would have arisen as to the meaning of "the time limited by the practice of the Court;" whether the appearance ought to be entered four days or eight days, as the case might be, from the service of the copy of the bill, or from the obtaining the order to enter a memorandum of service, or from the entry of such memorandum, or from the service of the order for such entry on the defendant, if such service be necessary. On these points I do not express any opinion. Here the defendant was served out of the jurisdiction,

and, as in such a case, service of the subpoena would have been made under the provisions of the two acts of parliament which have been mentioned, and as no time after the service of the subpoena is limited by the practice of the Court for a defendant so served to appear, the defendant has not been prevented by the 25th New Order from entering an appearance in the common form.

Motion refused, with costs.

12 Percy
53 L.J. 143
WIGRAM, V.C. } GREEN v. HARVEY.
May 2. }
Will—Construction—Limitation.

A, by his will, gave a leasehold house to his son R, "should he die without heir or will, the profits of the said house to be divided among all my grandchildren, with the consent of his mother:"—Held, an absolute gift to R, and that on his death, intestate and unmarried, it passed to his personal representatives.

Richard Green, the testator, by his will, dated in 1819, bequeathed as follows:—"My house, No. 4, in the Royal Crescent, &c., and also the house in the occupation of A. B, I give and bequeath to my son Richard, with all the household furniture, &c.; should he die without heir or will, the profits of the said No. 4, &c. to be divided among all my grandchildren, with the consent of his mother." In 1819, the testator died. In 1827, Richard Green, the son, died intestate and without ever having been married. The personal representatives of the testator claimed the property under the limitation over in the will, and the personal representatives of Richard, the son, insisted that it was an absolute gift by the testator to Richard, the son.

The plaintiffs were the representatives of the son; the defendant Harvey was the surviving executor of the testator, and the other defendants were the grandchildren of the testator.

Mr. Boteler and *Mr. Hare*, for the plaintiffs.—If this had been freehold property, the son would have taken an estate tail; as it is personalty, he took an absolute interest. The addition of the words "or will," makes no difference.

Robinson v. Dusdale, 2 Vern. 181.
Maskelyne v. Maskelyne, Ambl. 750.
The Attorney General v. Hall, 1 Jac. & Walk. 158, n.
Ross v. Ross, Ibid. 154.
Gray v. Montague, 6 Bro. P.C. 429.
2 Prior on the Construction of Limitations over.

In *Cuthbert v. Purrier* (1), which is very similar to the present case, *Nannock v. Horton* (2) is distinguished from the above case, as being an estate for life, with a power afterwards given expressly as a power. This is a condition, if such, inconsistent with the gift, and therefore void.

Bradley v. Peizoto, 3 Ves. 324.
Simmons v. Simmons, 8 Sim. 22; s. c. 5 Law J. Rep. (N.S.) Chanc. 190.

Mr. J. Russell and *Mr. Green*, for the grandchildren of the testator.—In the cases cited for the plaintiff, there was an unlimited power of disposition. Here, the limitation is not inconsistent with the previous part of the will. The word "heir" must be construed lineal descendant, and "or" cannot be construed "and," and the gift over has reference to the consent of a person then in being, so that it cannot mean indefinite failure of issue. The word "issue" may be confined to children—*Sibley v. Perry* (3). The case of *Simmons v. Simmons* was decided more upon the doctrine of *Genery v. Fitzgerald* (4), than upon any other principle. The following cases were also cited:—*Keily v. Fowler*, 3 Bro. P.C. 299.
Campbell v. Harding, 2 Russ. & Myl. 390.
Devisme v. Mello, 1 Bro. C.C. 537.
Gawler v. Cadby, Jac. 346.

Mr. Wray and *Mr. Haddon*, for the afterborn grandchildren, cited *Doe d. Hatch v. Bluck* (5).

Mr. Boteler, in reply.

May 9.—WIGRAM, V.C.—I am of opinion that the plaintiffs' claim is well founded. The first question is, whether "or" is to be read in its proper sense, or whether "and"

- (1) Jac. 415.
- (2) 7 Ves. 392.
- (3) Ibid. 522.
- (4) Jac. 468.
- (5) 6 Taunt. 485.

is to be substituted for it. The testator, by referring to the heirs of his son, must have meant the issue of his son. That shews that the issue of his son were objects of the testator's care. That consideration alone, according to the better authorities, seems generally to have determined courts of justice, in substituting "and" for "or," in the construction of wills. In a note to the first volume of *Jarman on Wills*, 379, those authorities are collected. The circumstance that "or," in common parlance, is frequently used for "and," has apparently aided the Court in this departure from that sound rule of construction, which requires a court of justice to adhere to the proper sense of the words, except where the will itself, or some other circumstances, afford evidence that the testator did not intend so to use them. In this case, the remarkable inaccuracy of the will shews that the critical observance of the words is not safely to be relied on. I cannot adopt any other construction in this case, without imputing a most capricious intention to the testator. The next question is, as to the effect of the limitation over in the event of Richard dying without a will. The gift to Richard was absolute in the first instance. The general rule of law is, that an absolute interest is not taken away by a gift over, unless the gift itself takes effect; and it has been repeatedly decided, that where a legacy is given absolutely, with a gift over in the event of the legatee dying, and not disposing of it, the gift over is void, and the legacy is absolute—*Ross v. Ross*, *Bradley v. Peixoto*. The question is, whether there is any difference between a gift over, in the event of the legatee not disposing of the legacy in his lifetime, and in the event of his not disposing of it by will. No such distinction can be maintained. The will of Richard is not to be regarded as the exercise of a power, but as an incident to property sufficient to place the whole at his absolute disposal. The cases cited by Mr. Boteler shew that where an absolute power is given by will, the interest is absolute also. I read that part of the will, as if he had said, "if he should have no heir, and should not dispose of the property by will." I must declare that the plaintiff is entitled, and the costs must come out of the estate.

V.C. }
May 4. } MARTIN v. MARTIN.

*Devise of Advowson—Power of Sale—
Next Presentation—Maintenance.*

A testator devised and bequeathed his advowson and presentation to a living, of which he was the incumbent, and also all his real and personal estate to trustees, with a power to sell at their discretion his said advowson, and all other his estates and invest the proceeds for the benefit of the children of his sister, who should attain twenty-one, with powers of maintenance and advancement, in the meantime, out of the rents, dividends, interest, and annual income:—Held, that the next presentation to the living, though in law a beneficial interest, could not be so considered where there were powers of maintenance out of the rents, dividends, &c., and passed in the present case to the heir-at-law.

The Rev. William Marsden, by his will, dated the 18th of August 1840, gave, devised, and bequeathed his advowson, donation, nomination, free disposition, and right of patronage and presentation of, in, and to the rectory of the parish and parish church of Everingham, whereof he was then incumbent, with the rights, privileges and appurtenances belonging, or in anywise appertaining, and also certain houses and tenements, with their appurtenances therein particularly mentioned, and all other his real estates which he might die possessed of, subject to several annuities, and also all his leasehold messuage and premises in Southwark; and also all his canal and river navigation shares, subject to his debts and funeral and testamentary expenses, unto and to the use of his college friends, the Rev. William John Blew, and the Rev. John Grant, upon trust to sell and convert into money, when and as they should think proper, all such part or parts of his said personal estate and effects, as should not consist of monies or securities for money, and get in all such part as should consist of monies and securities for money, and thereupon invest the monies arising by such sales in the funds. The testator then declared, that his trustees should take the rents, dividends, and annual income of his real estates until sold, and also the proceeds of his personal estates; in the

first place to pay the annuities and charges therein mentioned, and to pay the surplus unto his sister Charlotte, for life; and in case she should have a child or children born alive, then in trust for all and every her children or child; and if she should not have any children or child, upon trust for his said two friends, William John Blew and John Grant. The will then contained a proviso, that the trustees might exercise a discretionary power, either to retain and keep, or to sell and dispose of the canal shares, as they should think fit; and the testator directed his trustees with all convenient speed after his decease, as to his advowson of the rectory of Everingham, and also all other his said real estates whatsoever and wheresoever given and devised by his will, and also his said leasehold messuage and premises, to sell and dispose of all and singular his said real estates; and the testator directed his trustees, at their discretion, during the minority of any child or children of his sister Charlotte, to pay or apply the rents, dividends, interest, and annual income of the presumptive share or shares of the same child or children, of and in his said real estates, if not then sold, and if sold, then of the money arising therefrom, for and towards the maintenance, education, and advancement of such child or children, and that all the surplus rents, dividends, interest, and annual income which should not be applied for that purpose, should be invested in the public funds, and allowed to accumulate for the benefit of the child or children, from whose share or shares the same should be saved. The testator appointed his trustees executors of his will.

The testator died in December 1841, leaving Charlotte Martin, his only sister, surviving him. The petitioners were the only children of Charlotte Martin, and her husband, John Martin, and as such only children, were entitled, under the will of the testator, to equal shares in the several devises, in the event of their attaining twenty-one.

The bill was filed in March last, to establish the trusts of the will. The petition prayed, that it might be declared by the Court to whom the nomination and presentation to the parish church of Everingham belonged, or that it might be referred to the Master to approve of a fit person to be ap-

pointed to the church, and that such person might be presented accordingly.

Mr. Bethell and *Mr. Ellison*, in support of the petition, contended, that the nomination to the rectory of Everingham was to be exercised by the trustees, in favour of the petitioners, for whose benefit the testator clearly intended the proceeds to be applied. This was a gift of the advowson immediately upon the death of the testator, and the only question was, whether the words "rents and profits" would include the next presentation; there was here a sufficient manifestation of the intention of the testator, that the estate should vest in the children, so as to divest any interest in the heir-at-law.

Sherrard v. Lord Harborough, Ambl. 165.

Hawkins v. Chappell, 1 Atk. 621.

Holt v. Winton, 3 Salk. 280.

Mr. Richards and *Mr. Hardy*, for the trustees.—The testator has devised the advowson in fee, in the first instance, to the trustees, and they claim the presentation as being a discretion in them; and if given to them, the Court cannot take it away and give it to the children. The children might never attain twenty-one, and, therefore, might never be entitled to any interest; if so, the trustees would themselves be entitled to it. It must be presumed, that the testator knew the law. The gift was clearly to those children only who attained twenty-one; and was, therefore, not a vested interest. The testator intended the advowson to be sold for the most that could be obtained, and the proceeds invested; the presentation was a mere adjunct to the sale, and that was vested in the trustees.

Seymour v. Bennett, 2 Atk. 483.

Mr. Goulburn, for the heir-at-law.

The VICE CHANCELLOR.—It appears to me, that this is a very simple question. The testator has devised his property to the two gentlemen named as trustees, and the trusts are in the nature of executory devises. In the events which happened, the trusts were for those children of the testator's sister who should attain twenty-one; and in case no child attained twenty-one, then for the trustees themselves. Now, as there were children living at the death of the

testator, they were the executory devisees of the trust. Then there is a direction to the trustees to sell: they have not done so, and by the death of the testator the church became vacant. There is a further trust, that during the minority of the children who might take, there should be maintenance and advancement for them out of the rents and profits, and the surplus rents, dividends, interest, and annual income should be accumulated. It is plain, that though the law does hold the presentation to a church to be a beneficial interest, yet it could not be beneficial in the sense of being a means of producing an income for the maintenance and advancement of the children. This appears to me to be like any other thing, which, being separated from the devise, descends to the heir-at-law. I must, therefore, hold, that the next presentation to this living has descended to the heir-at-law of the testator.

WIGRAM, V.C. }
 April 29 ; } MEEKE v. KETTLEWELL.
 May 1, 23. }

Voluntary Assignment — Expectancy — Trust.

An assignment by deed of a mere expectancy without consideration, and without notice to the trustees in whose names the stock stands, will not be enforced in equity against the assignor.

The testator, by his will, gave a sum of money to A. and B. in trust to invest, and pay the dividends to his daughter for life; and if she should die without issue, the principal to go to the daughter's next-of-kin, exclusive of her husband. The widow of the testator by deed, reciting that she would be entitled as next-of-kin in the event of the daughter dying without issue, assigned all her expectant share in the stock to M. the husband of the daughter. Upon the death of the daughter without issue, M. filed his bill against the widow and the trustees of the will, to have the fund paid to him according to the deed:—Held, that the subject-matter of the assignment being a mere expectancy, and there being no formal declaration of trust and no consideration, and no notice to the trustees, the Court would not enforce the deed against the settlor.

J. Kettlewell, the testator, by his will, dated the 14th of August 1838, bequeathed 11,000*l.* to two trustees in trust to invest the same upon government securities, and to pay the interest, &c. to his daughter for her life; and in the event (which happened) of her dying without issue, the testator gave 100*l.*, part thereof, to A. B. and the residue to the next-of-kin of his daughter, exclusive of her husband, and he appointed his trustees his executors. On the 11th of May 1839, the testator died, leaving his widow, Mary K. and his daughter, surviving him; and the will was proved, and the 11,000*l.* invested in the names of the trustees.

It appeared, that some short time before the death of the testator, a treaty of marriage had been set on foot between the plaintiff and the daughter of the testator, which marriage did not take effect till the 20th of July 1839, after the death of the testator. It was alleged, that the testator had intended to make some more favourable provision by his will, as regarded the plaintiff, which intention was only prevented by his sudden death; and that Mrs. Kettlewell, the widow, being desirous of carrying out the intentions of the testator, by a deed of the 10th of September, 1839, made between Mrs. Kettlewell of the one part, and the plaintiff of the other part, reciting the will and death of the testator, and that Mary Kettlewell, in the event of her daughter dying without issue, would be entitled to the 11,000*l.*, and that she had contracted to assign all her interest in the 11,000*l.* to the plaintiff; Mary Kettlewell in pursuance of the contract, and in consideration of natural love and affection, assigned to the plaintiff all that her said reversionary or expectant share in the 11,000*l.*, and appointed the plaintiff her attorney to receive the money; in trust as to 100*l.* for A. B.; as to 3,000*l.* for herself; and as to the remainder for the plaintiff and his executors, for his own absolute use. The daughter being shortly afterwards in delicate health, and not expected to live, Mrs. Kettlewell began to repent of what she had done, and the plaintiff being solicited by her, signed a memorandum dated 21st of December 1839, on the back of the above deed, by the terms of which Mrs. Kettlewell was to have an additional 3,000*l.* out of the 11,000*l.* On the 7th of January 1840, the daughter died without

issue, and thereupon Mrs. Kettlewell became entitled under the will, as next-of-kin of her daughter, to the 11,000*l.*, except so far as her right was affected by the deed of the 10th of September 1839, and the subsequent memorandum. Mrs. Kettlewell then insisted, that the deed, being voluntary, was not binding on her, and that she was entitled to the whole of the 11,000*l.*, and the trustees of the will then refused to pay over the fund except under the directions of the Court. The plaintiff then filed his bill against Mrs. Kettlewell and the trustees of the will, praying that the trustees might be decreed to pay over the fund according to the deed of September 1839, and the subsequent memorandum. It did not appear that the trustees, in whose names the fund was invested, had done any act by which they acknowledged or assented to the deed.

Mr. James Russell and *Mr. Keene*, for the plaintiff.—This is not the case of a person declaring herself a trustee for another of funds standing in her own name. In such a case, the Court would not, at the instance of a volunteer, compel execution of the trust; but here the fund is in the hands of third persons, who, by this complete declaration of trust, have ceased to be trustees for Mrs. K. and have become trustees for the person entitled under the settlement, and nothing remains to be completed by the settlor, and therefore there is no *locus pœnitentiæ*.—

Sloane v. Cadogan, 3 Sugd. Vend. & Pur. App. 27.

Ellison v. Ellison, 6 Ves. 656.

Edwards v. Jones, 1 Myl. & Cr. 226.

Collinson v. Pattrick, 2 Keen, 123.

Pulvertoft v. Pulvertoft, 18 Ves. 84.

Ex parte Pye, Ibid. 140.

Jones v. Croucher, 1 Sim. & Stu. 315.

None of the cases have decided that it is necessary to give notice to the trustees.

[WIGRAM, V.C.—The question is, whether an assignment which has no effect in law, is to be enforced in equity without consideration.]

The only question is, whether the relation of trustee and *cestui que trust* has been actually constituted.

Mr. Sharpe, *Mr. Wilbraham*, and *Mr. Wilcock*, for Mrs. Kettlewell.—During the life of the daughter, the widow had no in-

terest in the fund, but merely a *spes successionis*; no interest that would pass by conveyance, assignment, or release; or that would have passed to the assignees, if the party had become bankrupt—*Moth v. Frome* (1). The trustees under the will, therefore, were not trustees for the widow, when she executed that deed, and she could not direct them to be trustees for other persons. The mother had only the chance of being next-of-kin at the death of the daughter. *Nemo est hæres viventis* applies to this case, for next-of-kin is the same as heir in the case of real estate.

Higden v. Williamson, 3 P. Wms. 132.

Co. Litt. 264, *b*, *Butler's Note*.

Wright v. Wright, 1 Ves. sen. 411.

Kentish v. Gray, 1 Atk. 280.

Carleton v. Leighton, 3 Mer. 667.

If a contract is made respecting it, no interest passes at the time, for it is merely an executory contract.

Moth v. Frome, Amb. 394.

Beckley v. Newland, 2 P. Wms. 182.

Wethered v. Wethered, 2 Sim. 183.

Lyde v. Mynn, 1 Myl. & K. 683.

Hyde v. White, 5 Sim. 524.

All these cases shew that it rests in agreement, and that to enforce it, valuable consideration must be shewn—*Coleman v. Sarel* (2). *Sloane v. Cadogan* has been materially shaken by subsequent decisions. *Collinson v. Pattrick*, compared with *Edwards v. Jones*, shews that there must be a declaration of trust in form; and not such a one as can be implied from the contract between the parties. There is no direction here, as in *Collinson v. Pattrick*, to the trustees to hold the fund for the husband, but merely an assignment to him. In *Holloway v. Headington* (3), the legal estate was in third persons, and the Court refused to execute the trust—*Tufnell v. Constable* (4).

Mr. J. Russell, in reply.—Mrs. Kettlewell might have passed this interest by her will—*Roe d. Perry v. Jones* (5). In a suit to administer the estate, Mrs. K. would have been a necessary party. In *Holloway v. Headington*, the decision went on the whole

(1) Amb. 394.

(2) 3 Bro. C.C. 12.

(3) 8 Sim. 324.

(4) Ibid. 69.

(5) 1 H. Black. 30.

transaction being unintelligible. In *Edwards v. Jones*, there was no equitable estate distinct from the mere legal estate. Here, the plaintiff has only to ask a decree against the trustees, as was the case in *Sloane v. Cadogan*.

May 23.—WIGRAM, V.C., after stating the facts of the case, proceeded thus:—Under these circumstances, the plaintiff has filed his bill to have the benefit of the trust. In support of the plaintiff's claim, the cases referred to were *Coleman v. Sarel*, *Ellison v. Ellison*, *Pulvertoft v. Pulvertoft*; that where a trust is actually created in favour of a volunteer, the Court will not refuse to enforce it. According to *Ex parte Pye* and *Ex parte Dubost* (6), a party may so constitute himself a trustee of stock, that it may become the property of the *cestui que trust* without more. "It is clear," says Lord Eldon, "that this Court will not assist a volunteer; yet, if the act is completed, though voluntary, the Court will act upon it. It has been decided, that upon an agreement to transfer stock, this Court will not interpose." If the limits of the law are to be collected from the cases referred to, they do not establish more than that where the legal interest is vested, in pursuance of directions in third persons, and the trusts fully declared, the Court will execute the trust though voluntary. There does not appear, however, to be any reason why the doctrine should be so confined, provided the trusts are actually created, and the relation of trustee and *cestui que trust* is once established. The language of Lord Eldon is not so limited. From *Wheatley v. Purr* (7) and *Godsal v. Webb* (8), I conclude that Lord Langdale was of the same opinion. In the case of a formal declaration of trust, in favour of a volunteer, these considerations might arise. But here there is no formal declaration of trust; and the simple question is, whether the facts established constituted the relation of trustee and *cestui que trust*; whether by the voluntary assignment of September 1839, the beneficial interest in the fund, became in equity the property of the plaintiff. Finding the doctrine well defined, that where a trust is created, the

Court will act upon it, and that a person may constitute himself a trustee for another, it might be contended, that where the beneficial owner has done what unequivocally amounts to the same thing, and the person in whom the legal interest is, had notice of the declaration of trust, the Court would have fastened upon it, and held that he had created a trust. But it is impossible to say, that the reported cases will support such a proposition. Without referring to the cases at large, the case of *Edwards v. Jones* shews that the most clear intention, is not sufficient to create a trust in favour of a volunteer, though communicated to the *cestui que trust*. That was the case, where the obligee of a bond signed a memorandum not under seal, which was indorsed upon the bond, and which purported to be an assignment of the bond, without consideration, to the person to whom the bond was at the same time delivered, and it was held an imperfect gift, and not a trust. I consider myself bound, by the authority of that case, to hold, that in the absence of a formal declaration of trust, the question must be determined upon the strict law, and not upon the circumstances; the most conclusive evidence of intention will not be conclusive as to the trust. But it is said for the plaintiff, that the legal interest being in the trustees under the will, the assignment of September 1839, would create a trust, and that the case of the bond was distinguishable from the present case; but I cannot discover any ground of judicial distinction, where the question is only, whether a trust has been created. If Mrs. Kettlewell had assigned it for value, and notice of the assignment had been given to the trustees, it would be impossible to hold that the assignment for value would not have prevailed over the voluntary assignment—*Dearle v. Hall* (9), *Loveridge v. Cooper* (10), *Foster v. Blackstone* (11), *Meux v. Bell* (12). But this consequence would not have followed, if the trust had been actually created, provided the legal interest was transferred—*Bill v. Cureton* (13), *Jones v. Croucher* (14). My conclu-

(9) 3 Russ. 1; s. c. 2 Law J. Rep. Chanc. 64.

(10) Ibid.; s. c. 2 Law J. Rep. Chanc. 75.

(11) 1 Myl. & K. 297; s. c. 9 Bli. N.S. 332.

(12) 1 Hare, 73; s. c. 11 Law J. Rep. (N.S.) Chanc. 77.

(13) 2 Myl. & K. 503.

(14) 1 Sim. & Stu. 315.

(6) 18 Ves. 140.

(7) 1 Keen, 551.

(8) 2 Ibid. 99.

sion is, that the relation of trustee and *cestui que trust* is not created, unless such effect is to be attributed to a deed under seal. Upon this part of the case, *Edwards v. Jones* is an authority, that a writing, not under seal, would not create a trust, however clear the intention might be. If the assignment has given an interest, it must be on the ground, that a deed under seal, though voluntary, is binding in equity, as between the party himself and his assignee. A decision founded upon this distinction would give effect to an instrument under seal, beyond what I conceive a court of equity has ever allowed it. *Coleman v. Sarel* is a direct authority for the purpose of deciding a case like the present: there, there was a deed under seal, and it was held not sufficient. An assignment under seal of what does not pass at law, stands in no better situation than a covenant. *Holloway v. Headington* is an authority for the same proposition. The Judge by whom the latter case was decided, held, that a voluntary assignment never operated to pass an equitable interest. The present case is less favourable to the plaintiff than many of the

others, for Mary Kettlewell had nothing but an expectancy; and the cases shew, that a deed assigning an expectancy, not founded on value, does not operate as an estoppel. But it was said, that if I decided that the plaintiff had failed, I should decide so, in the face of Sir W. Grant's decision in *Sloane v. Cadogan*. If such were the fact, I should shelter myself under the authority of *Coleman v. Sarel*, and of Sir E. Sugden, who has expressed disapprobation of *Sloane v. Cadogan*; and from the difficulty Lord Cottenham had in reconciling *Sloane v. Cadogan* with the other cases, and the opinion of the Vice Chancellor of England. In deciding against the plaintiff, I do not give any opinion of the effect of a formal declaration of trust, if Mary Kettlewell had had more than a mere expectancy, and if, in addition, notice had been given to the trustees. I decide only, that a voluntary assignment of a mere expectancy, without notice to the trustees, does not give a right which equity will enforce. The bill must be dismissed without costs, as it is not a very moral act on the part of Mary K. The trustees to retain their costs out of the fund.

END OF EASTER TERM, 1842.

CASES ARGUED AND DETERMINED

IN THE

Court of Chancery.

TRINITY TERM, 5 VICTORIÆ.

WIGRAM, V.C. }
May 25, 26. } HUGHES v. EADES.

Practice.—Defective Proof—Liberty to perfect at the Hearing.

Creditor's bill by A. against the executors and devisees in trust of his debtor, and the persons beneficially interested in the real estate under the will, two of whom were under disability, and two were alleged by the bill to be out of the jurisdiction, praying an account of the real and personal estate, &c. All the defendants who were sui juris, admitted the debt, and the fact of the other parties being out of the jurisdiction, but the plaintiff had omitted to prove his debt against the parties not sui juris, and the fact of the others being out of the jurisdiction:—Held, that the admission of the debt by all the defendants who were sui juris, was sufficient to justify the Court in decreeing the usual accounts, with liberty to the plaintiff to exhibit interrogatories to prove his debt, and the fact of the parties being out of the jurisdiction.

The testator, by his will, after charging his property with his debts, devised all his real estate to trustees, upon trust for his wife for life, with remainder to his children. A creditor's suit was instituted, and the defendants were the executors, the trustees, the tenant for life, and the parties entitled in remainder, of whom one was a married woman, another was an infant, and two

were out of the jurisdiction. The executors, the trustees, the tenant for life, and some of the parties in remainder, who were *sui juris*, and the married woman, by their answers, admitted the plaintiff's debt. But no evidence had been entered into by the plaintiff, to prove his debt against the married woman, the infant, and the parties out of the jurisdiction, or to prove the fact of the parties being out of the jurisdiction; but that fact was admitted by all the other defendants.

Mr. Koe, for the plaintiff.—The admission of the debt by all the defendants, who are *sui juris*, is sufficient *prima facie* evidence to entitle the plaintiff to a decree; for his debt, notwithstanding the decree, must be proved again in the Master's office. As to the parties out of the jurisdiction, the practice is to refer it to the Master, to inquire as to that fact, and, if he finds it in the affirmative, to proceed with the account.

Mr. Craig, for the tenant for life and the infant.—As the plaintiff has not proved his debt against some of the defendants entitled to the real estate, the bill must be dismissed against them with costs; or at least, as against the infant—*Marten v. Wichelo* (1).

Mr. Kenyon Parker, *Mr. Jeremy*, *Mr. Wright*, and *Mr. G. Russell*, for other parties, contended, that to prove a party out of the jurisdiction, the proper practice was

(1) 1 Cr. & Ph. 257; s. c. 10 Law J. Rep. (N.S.) Chanc. 384.

to exhibit an interrogatory for that purpose—*Egginton v. Burton* (2).

May 26.—WIGRAM, V.C.—The evidence in the cause is sufficient to entitle the plaintiff to his decree, as far as regards the personal estate, the executors having admitted the debt. As the case is not concluded by such decree, but the debt is to be proved again in the Master's office—*Owen v. Dickenson* (3), *prima facie* evidence is sufficient. As to the real estate, it is contended, that the bill must be dismissed with costs, because there is not sufficient evidence of the debt as against some of the parties entitled to the real estate. The parties *sui juris* admit the debt; but the proof is defective against the married woman and the infant and the parties out of the jurisdiction. The question is, whether the bill must be dismissed, or whether the plaintiff shall have the indulgence of proving his debt against those parties. In *Marten v. Wichelo*, there was no proof against any party whatever, and Lord Cottenham said, "That the Court would not at the hearing allow a plaintiff to prove that on which his whole case depended." There the plaintiff had given no evidence of his debt. That is not the case here. Lord Cottenham, after reference to the authorities, said, "The Court has exercised a wide discretion in giving or refusing leave to supply the defect of evidence, in doing which, the merits of the case, upon the plaintiff's own shewing, ought to have a leading influence;" and he held the merits of that case insufficient. From the authorities, it appears that there are cases in which the Court has granted the indulgence. In *Seton on Decrees*, 364, a case is mentioned, in which a party had admitted the debt, but he was not competent to do so, and the Court gave the plaintiff leave to prove the debt—*Hodgson v. Merest* (4). In *Hood v. Pimm* (5), the plaintiffs filed a bill, as devisees of A, but omitted to prove his will; the answer neither disputed the will, nor admitted it; the Vice Chancellor, at the hearing, dismissed the bill with costs, but, upon a petition of rehearing, the case was argued at length, and he said, that as it was a mere slip, he would give the parties leave to per-

fect their proof, by exhibiting interrogatories to prove the will. So in *Cox v. Allingham* (6), where Sir Thomas Plumer considered the case upon principle. The only difficulty here would be, as to the infant; but, as all the parties before the Court, who are *sui juris*, admit the debt, I think I am justified in giving the plaintiff leave to perfect his case by the necessary proof. How is that to be done? The plaintiff alleges, that two of the parties are out of the jurisdiction, but he gives no evidence of the fact. The authority of *Lechmere v. Brasier* (7) would be sufficient to shew that this ought to be proved in the regular manner, by exhibiting an interrogatory. In some cases, the cause is directed to stand over, with liberty to exhibit an interrogatory. In other cases, rather than delay an account, the account is directed, with leave to exhibit an interrogatory—*Lechmere v. Brasier*. A third course, is to send it to the Master to inquire and state whether the fact is proved or not. But, as in this case the plaintiff must have leave to prove his debt, by exhibiting interrogatories, the better course will be, for him to prove that the parties are out of the jurisdiction in the same manner. No doubt, the regular practice is to allow it to be done by exhibiting an interrogatory; or where the Court can make a decree as to part, by making a partial decree, with liberty to exhibit interrogatories. The plaintiff ought to have proved that part of his case before he brought the cause to a hearing. It was said, that the course of the Court was different. In *Egginton v. Burton*, I decided that the regular practice was to have it proved by an interrogatory; Lord Cottenham said that was the regular course. It was Sir J. Leach's opinion in *Bulter v. Borton* (8), and Lord Langdale's in *Dibbs v. Goren* (9); and in *Hood v. Pimm*, the Vice Chancellor of England took the same course. I shall adhere to that course, until my view of the case is overruled by higher authority. My decree will be for the usual accounts, with liberty to the plaintiffs to exhibit interrogatories to prove their debt, as against the real estate, and also to prove the other parties out of the jurisdiction.

(6) Jac. 337.

(7) 2 Jac. & Walk. 287.

(8) 5 Mad. 42.

(9) 1 Bea. 457.

(2) *Ante*, p. 272.

(3) 1 Cr. & Ph. 48.

(4) 9 Price, 563.

(5) 4 Sim. 101; s. c. 9 Law J. Rep. Chanc. 63.

WIGRAM, V.C. }
May 26, 27. } MASSEY v. MOSS.

Costs—Assignees of Bankrupt—Creditors' Suit.

To a creditors' suit, the assignees in bankruptcy of the defaulting executor of the debtor, were made parties:—Held, that they were not entitled to have their costs out of the estate.

Secus—as to the costs, if any, of an unsuccessful attempt on the part of the plaintiff to charge the assignees personally with the receipt of specific parts of the testator's estate.

This was a creditors' suit, in which the plaintiff has established a case of default against the executor of the deceased debtor. The defaulting executor having become bankrupt, his assignees were made parties to the suit. It appeared by the inquiries before the Master, that the assignees had received no part of the estate of their bankrupt's testator.

Mr. O. Anderdon, for the assignees, now claimed to have their costs out of the estate.

Mr. Girdlestone, Mr. Elmsley, Mr. Follett, Mr. Terrell, and Mr. Bloxam, for other parties.

May 27.—WIGRAM, V.C.—In the cases of *Appleby v. Duke* (1) and *Cash v. Belcher* (2), I decided, upon the authority of *Hunter v. Pugh* (3), that the assignees of an insolvent or bankrupt mortgagor were not entitled to the costs of a foreclosure suit, however they might be entitled to retain them out of the bankrupt's estate. *Barry v. Wray*, *Beames on Costs*, App. 392, confirms that view of the case. It was argued, that the principle of those cases did not apply to the case before me, because in those cases, the assignees were brought before the Court for their own benefit, in respect of the interest which they had; whereas, in the present case, the assignees were brought before the Court for the benefit of the plaintiff only, in order that the plaintiff might establish the amount of his debt, to be proved against the bankrupt's estate. It was said, in such a case, the practice was to give the assignees the costs out of the testator's estate. I am satisfied,

that no such general rule exists. To shew this, it is sufficient to put the case of a bankrupt, whose estate leaves a surplus after paying 20s. in the pound. It is clear, in such a case, the estate of the testator ought not to pay the costs of the executor—*Tebbs v. Carpenter* (4); yet such would be the effect of the general rule contended for. The rule of the Court has been, to allow the assignees to retain their costs out of the bankrupt's estate, a rule which is more consonant to the justice of the case, than that contended for. However hard it may be to make the assignees pay costs, under the present circumstances, I cannot understand upon what principle the assignees can receive the costs of a suit instituted to repair losses occasioned by the party represented by them. But it is said, that there are no assets of the bankrupt, whom they represent, and that in such a case they ought to receive their costs. If the law were so, it would be necessary for the assignees to make a special application, that the Court might be satisfied that it was a proper case, and within the rule. *Williams v. Nizon* (5), and my own decisions in *Appleby v. Duke* and *Cash v. Belcher*, proceed upon the principle, that the assignees stand in the same situation as the bankrupt; and the registrars inform me, that they consider my view of the practice correct. To guard against misapprehension, I think it right to say, that if costs were occasioned by an ineffectual endeavour to charge the assignees personally, in respect of specific parts of the estate possessed by them, the costs of such part of the bill would deserve a different consideration; but it is admitted that there are no such costs here. The order must be, that the assignees are only entitled to their costs out of their own estate.

WIGRAM, V.C. }
June 6, 7, 8, 9. } LANGTON v. HORTON.

Ship and Shipping—Assignment—Future Cargo—Chronometer.

An assignment of a future cargo, is good in equity.

A, by deed, assigned a ship (then at sea and engaged in the South Sea Fishery) and

(1) *Ante*, p. 194.
(2) *Ibid.* 196.
(3) Not reported.

(4) 1 *Mad.* 308.
(5) 2 *Beav.* 472; s. c. 9 *Law J. Rep.* (N.S.) *Chanc.* 269.

"her future cargo," to L. & Co., by way of mortgage. A. and L. & Co. both forwarded to the captain notice of the assignment. On the arrival of the ship in London, the captain, by the directions of M, the managing clerk of A, (who was then abroad,) delivered up the ship and cargo to L. & Co., who put their agent on board. Two days after, the sheriff seized the ship under a *fi. fa.* On bill by L. & Co. :—Held, that they, having got an assignment of the future cargo, which would be good in equity against A, and having perfected their legal title by taking possession lawfully, were entitled to hold the same against the judgment creditor.

A chronometer on board of a ship engaged in the South Sea Fishery, passes under an assignment of "all the appendages and appurtenances" of the ship.

The bill stated, that the plaintiffs in the cause carried on business as oil-merchants at Newington Butts, under the firm of Langton & Bicknell; that the defendant Birnie was a ship-owner, and carried on business in London, under the firm of A. Birnie & Son; that before April 1837, there had been dealings between the plaintiffs and Birnie, by which, Birnie had become indebted to them in a large amount; that in April 1837, Birnie was the owner of four ships, the *Foxhound*, the *Toward Castle*, the *Hope*, and the *Elizabeth*, then employed in the South Sea Whale Fisheries, and that these ships and their expectant cargoes were all subject to various incumbrances, charged thereon by Birnie to various persons, and particularly the *Foxhound* and her cargo, were subject to a mortgage to the plaintiffs for a considerable sum, and the cargoes of three of the four ships were subject to certain contracts for sale; that Birnie at that time was indebted to plaintiffs in a large amount, besides what was secured on the *Foxhound* and cargo, and it was agreed between plaintiffs and Birnie, that such further amount should be secured by a mortgage of the four ships, and their respective cargoes, and of the benefit of the before-mentioned contracts for sale of the cargoes of the three ships, subject to the existing incumbrances; that in pursuance of such agreement, a deed of the 13th of April 1837, was executed between Birnie of the one part, and plaintiffs of the other, by which Birnie assigned the

said four ships and their cargoes, and the benefit of the contracts for sale, (subject to existing incumbrances,) to plaintiffs, their executors, &c., upon trust for securing to the plaintiffs the repayment of 5,197*l.* 14*s.* 2*d.*, money due, and 4,000*l.* for which the plaintiffs had made themselves responsible, by accepting a bill of exchange for that sum, and for any further advances to be made by them to Birnie, not exceeding in the whole the sum of 20,000*l.*, and for that purpose to sell and dispose of the said mortgaged property; that in August 1837, the *Foxhound* arrived in London with a cargo of oil, and the cargo was duly delivered under a previous contract of sale; and the mortgage debt thereon secured to plaintiffs previous to the deed of the 13th of April 1837, was paid, and the *Foxhound* released therefrom, and also from all claims under the deed of the 13th of April 1837, the other three ships and cargoes remaining liable; that in March 1838, the *Foxhound* again sailed for the South Sea Fisheries; that previously to her sailing, Birnie applied to the plaintiff for a further advance of 5,000*l.* over and above the 20,000*l.*, which the plaintiffs agreed to advance, upon having the same secured by a mortgage of the *Foxhound*, her stores, apparel, appurtenances, and cargo, and by a further charge upon the ships and property comprised in the deed of April 1837, and that the sum secured by that deed, should be a charge on the *Foxhound* also; that by an assignment of the 2nd of March 1838, between Birnie of the one part, and plaintiffs of the other part, reciting that Birnie was sole owner of the *Foxhound*, and reciting the ship's registry, and the advance of the 5,000*l.*, Birnie assigned to the plaintiffs all that vessel called the *Foxhound*, then on a voyage to the South Seas, together with all and singular the masts, bowsprits, &c., guns, &c., chain and other pumps, provisions, stores, tackle, &c., binnacle and compass, *appendages and appurtenances* whatsoever, to the said vessel belonging, and also all oil and head matter, and other cargo which might be caught or brought home in the said ship or vessel, on and from her then present voyage, and all policies of assurance, and all muniments relating to the said ship, to hold to the plaintiffs, upon the trusts therein mentioned; then followed a covenant by Birnie for the repayment of the

5,000*l.* and interest, and all future advances ; and it was declared, that the plaintiff should stand possessed of the premises thereby assigned, upon trust for securing the 5,000*l.* and interest, and future advances, and the monies due under the assignment of the 13th of April 1837, with power to the plaintiffs to sell the premises, and out of the proceeds to pay themselves the principal money and interest due under the present deed, and that of April 1837, and to pay the surplus to Birnie ; with a proviso, that the whole monies secured should not exceed 25,000*l.*

That on the 2nd of March 1838, the assignment was duly registered, but that, the ship being at sea, the assignment could not be indorsed on the certificate of registry ; that by a deed of further charge of the same date, and indorsed on the deed of April 1837, the other three ships and cargoes were charged with the 5,000*l.* ; that the *Toward Castle* was wrecked, and the cargoes of the *Hope* and *Elizabeth* were received and applied in liquidation of the plaintiffs' demand, but that a large sum still remained due ; that in June 1838, Birnie became embarrassed, when the plaintiffs, at Birnie's request, made the necessary payments on account of the ships, to a large amount ; that in January 1841, the *Foxhound* returned to this country with a valuable cargo, and that there was then due to plaintiffs on their said securities, 15,000*l.* and upwards ; that on the 9th of January 1841, possession of the ship and cargo was taken by the plaintiffs' agent, on her entering the port of London, with the consent of Birnie ; that on the 13th of January following, the ship and her cargo were seized by the sheriff of Surrey, under a *fi. fa.*, at the suit of the defendant B. Horton, for 2,372*l.* 15*s.*, while the plaintiffs' agent was in possession ; that on the 16th of January, the plaintiffs caused a written notice to be served on the sheriff's officer, and at the office of the under-sheriff, of the indenture of the 2nd of March 1838, and that 13,000*l.* remained due thereon, and that plaintiff claimed the entire ship and cargo ; that the sheriff thereupon summoned the plaintiffs and Horton, under the Interpleader Act, and on the 19th of January, the Judge made an order, that an issue should be tried, in which the present plaintiffs were to be plaintiffs, and B. Horton defendant, and directed that the sheriff

should remain in possession until security for the amount of the levy should be given, and he reserved the question of costs ; that the plaintiffs were advised that the assignment of the 2nd of March 1838, did not operate as a valid assignment *at law* to the plaintiffs, of the cargo, by reason of the deed having been executed before the cargo was procured ; and that for other reasons also, the plaintiffs could not safely proceed to the trial of the issue ; but the plaintiffs insisted that that assignment was good in equity, the plaintiffs having been guilty of no laches in taking possession ; and they charged that the writ of *fi. fa.* was not in the hands of the sheriff till two days after the plaintiffs had been in possession. The bill then prayed, that it might be declared that the deed of the 2nd of March 1838, operated as a good, valid, equitable assignment to plaintiffs, of the ship *Foxhound*, and the cargo obtained by her on the voyage, which she was prosecuting at the date of the deed ; and that plaintiffs were entitled in priority to Horton ; and that Horton and the sheriff, &c. might be restrained from levying the amount of the said judgment, or from compelling plaintiffs to go to trial upon the said issue ; and that upon plaintiff giving security to answer the amount of the levy, possession might be delivered to them ; or for a receiver and sale ; or that an account might be taken of the plaintiffs' debt, and the amount realized by the sale of the ship and cargo ; and that such amount may be applied in satisfaction of what should be found due to the plaintiffs, &c.

The defendant Horton, by his answer, insisted that the assignment did not pass the cargo. He denied that the plaintiffs' agent was on board at the time of the seizure by the sheriff's officer, but insisted that the cargo was in the possession of the master as agent of Birnie. He insisted that it was not competent for the plaintiffs, after the order for the issue, to institute the present proceedings. That supposing the plaintiffs should be held entitled to the cargo, still the deed did not pass the chronometer, which was on board at the time of the seizure.

It appeared from the evidence, that on the 3rd of August 1838, while the ship was at sea, Macguffie, the managing clerk of Birnie, wrote to the master of the *Foxhound* to the following effect, informing him of

Birnie's embarrassments:—"You will return to the hands of Messrs. Langton & B, who will treat you liberally." It appeared also, that from that time the plaintiffs paid all the outgoings and expenses; that the master, on his arrival at the port of London, had an interview with the plaintiffs and Macguffie, the clerk of Birnie, and having read the deed of assignment of the *Foxhound*, sent instructions to the mate of the vessel (by the directions of Macguffie) to allow the plaintiffs' agent to take possession of the vessel, which he did on the 9th of January. The sheriff's officer came on board and took possession, on account of the defendant Horton, on the 11th of January.

The question was, whether the assignment of the 2nd of March, either at law or in equity, passed the cargo to the plaintiffs, so as to protect them from the defendant's judgment at law.

There was also a minor question, whether a chronometer, which was on board during the voyage, and at the time of the plaintiffs' taking possession, passed under the general words of the deed, "appendages and appurtenances" of the ship.

Mr. Sutton Sharpe and *Mr. Rolit*, for the plaintiffs.—The case that will be relied on on the other side, is *Robinson v. Macdonnell* (1). But an assignment of freight has been held good in—

Leslie v. Guthrie, 1 Bing. N.C. 697; s. c. 4 Law J. Rep. (N.S.) C.P. 227.

Kerswill v. Bishop, 2 Cr. & Jer. 529; s. c. 1 Law J. Rep. (N.S.) Exch. 227.

At all events, the cargo passed in equity.

Douglas v. Russell, 4 Sim. 524.

Re Ship Warre, 8 Price, 269, n.

Gardner v. Lachlan, 8 Sim. 123; s. c. 5 Law J. Rep. (N.S.) Chanc. 332; confirmed, on appeal, 4 Myl. & Cr. 129;

s. c. 8 Law J. Rep. (N.S.) Chanc. 82.

Curtis v. Auber, 1 Jac. & Walk. 526.

Davenport v. Whimmore, 2 Myl. & Cr. 177; s. c. 6 Law J. Rep. (N.S.) Chanc. 58.

Wellesley v. Wellesley, 4 Ibid. 561; s. c. 8 Law J. Rep. (N.S.) Chanc. 21.

[WIGRAM, V. C.—That last case lays down a much broader proposition than the others.]

(1) 5 Mau. & Selw. 228.

Metcalf v. the Archbishop of York, 1 Myl. & Cr. 547; s. c. 6 Law J. Rep. Chanc. 65.

Burn v. Carvalho, 7 Sim. 109; s. c. 4 Nev. & Man. 889.

There was no laches on our part, but an immediate taking of the possession, and notice given to every person to whom it was possible.

Mr. Hall, for Birnie.

Mr. Girdlestone, for the defendant Horton.—No legal title passed in the cargo by the assignment—*Robinson v. Macdonnell*. In a cause between the same parties as to the ship *Ann*, the Master of the Rolls drew a distinction between freight and cargo, that though freight may pass under an assignment, it does not prove that the cargo will. It is a matter which at law could only be the subject of breach of covenant—*Whitworth v. Gaugain* (2).

[WIGRAM, V. C.—After the purchaser had paid his purchase-money, and lawfully got possession, would the Court allow the vendor to eject him?]

Mr. Sharpe, in reply.—The plaintiffs have a better equity than the defendants; for the latter lent their money upon the personal security of Birnie, and then obtained a judgment; whereas, the plaintiffs lent their money upon the security of the property in the first instance. The plaintiffs, having obtained possession of the property, and shewing that that possession was in pursuance of a previous contract for valuable consideration, would be allowed to hold it against all claimants. It is on the same principle, that the Court interferes by injunction, to prevent a tenant removing crops and produce, which he has agreed with the landlord to leave at the end of the term; or in the case of the fixtures in a London house. The judgment creditor can only affect the property as it existed in the hands of the debtor. It is the same principle, where in an execution against the husband, the Court prevents the creditor seizing the property of the wife, trading under an agreement upon her separate account. *Whitworth v. Gaugain* was not a decision upon the subject, and it is inconsistent with the authorities and the general principles of law. The chronometer will pass by the assign-

(2) 1 Cr. & Ph. 325; s. c. 10 Law J. Rep. (N.S.) Chanc. 316.

ment, under the words "stores and appurtenances." Nearly all the witnesses speak of a chronometer as being absolutely necessary for a voyage to the South Seas.

WIGRAM, V.C.—The first question is, whether the future cargo passed at law or in equity, under the assignment by Birnie to the plaintiffs. I will lay out of the case the question of law altogether, as it is unnecessary for me to decide that, and I will look at it only as a question in equity. First, it was said, that neither in law nor equity could non-existing property pass by assignment. The cases decide, that by a contract for sale, an equitable interest in a thing not in existence, may become the property of the assignee. The cases may not decide it in that abstract way, or as to what must be done by the assignee to perfect his title. A great number of the cases referred to, are of common occurrence, *ex. gr.* where a tenant covenants to leave behind him things that could not be removed without inconvenience—a contract that such things as shall be upon the property at the end of the term, shall become the property of the lessor, upon his paying for them; which, in point of fact, is a contract to sell property not then belonging to the vendor; and a court of equity is in the habit of enforcing contracts of that description, where they are made for valuable consideration. Unless I deceive myself, there are important cases where the doctrine applies, as in the case of mines, where there is a contract to leave the rails, &c., at the expiration of the lease, to be paid for at a valuation, the contract being made with reference to implements not then upon the property, and not being confined to articles which were upon the property at the time of granting the original lease. But it is quite unnecessary to go into the general principle, because Lord Eldon in *Re Ship Warre* and *Curtis v. Auber*, decided all that is requisite for this purpose. If the cases are no authority for the case of a future cargo in terms, I should not think them less an authority applicable to the present case; because, the whole argument is, whether a future thing is the subject of assignment. When it is once said that freight may be assigned, or that a ship not belonging to the vendor may be the subject of assignment, the whole difficulty is got over, that non-existing property may

be the subject of assignment. I think it impossible to read Lord Eldon's judgment, without saying, that it is obvious that he does in terms, if not by decision, apply the reasoning to the case of future cargo. Put the simple case of a ship going out in ballast: the owner says, if you will find me 5,000*l.* for fitting out the ship, I will contract that the homeward cargo shall go to reimburse you. When it is once decided that future property may be the subject of contract, it will be a sufficiently binding contract, to entitle a person advancing his money, to claim the homeward cargo. If a man may contract for an expectancy, I cannot conceive why a person going to the South Seas may not contract that if he shall catch fish, that the cargo shall be a security for the amount of the advances. Without going into the numerous cases cited at the bar, I think this case applies so closely in specie, that I could not, without reversing it, throw a doubt upon the question, if everything has been done to perfect the equitable assignment. Was not Birnie bound? Quite enough has been done to perfect their title to the cargo. The ship was at sea at the time of the assignment. The plaintiffs took a deed assigning the property. It is said, that chattels pass by delivery or deed. If at the time of executing the deed, there had been any cargo in the ship, so much at least would have passed. All the parties go through the form of passing an interest, by an instrument adapted to the purpose; they give notice to the captain of the vessel, and wait for its return; and when it arrives on the 7th of January 1841, the plaintiffs send down and demand possession. The master comes to London; he had heard on his voyage of the transfer, and is satisfied by a perusal of the deed, and takes upon himself the responsibility of delivering possession to the plaintiffs. Supposing Birnie had been there to authorize a delivery, it could not have been disputed by the defendant that he had given the plaintiffs a right against all persons whose title was subsequent. But it was said that Birnie being absent, his clerk, Macguffie had no authority to deliver up possession; there is quite enough evidence to justify me in saying that there is so much probability that Macguffie had authority, that if the case turned upon that, I should have sent it to inquiry. That probability is further enforced by this: a deed has been

produced in court, which is said to be a power of attorney to Macguffie, to do all that was requisite. The whole transaction marks the probability; but as that deed is not proved in evidence, I must lay it aside, and consider how the delivery of possession is affected by the absence of Birnie. Birnie having executed a deed which, as between him and the plaintiffs, gives them a right to the cargo, puts that deed into their possession, and absents himself. The ship arrives, and the plaintiffs go to the agents of Birnie, produce the deed transferring the property, and induce the master of the vessel to deliver up possession to them. The master takes upon himself the responsibility of assuming that the deed passed the property. If the captain was ill advised, he might have made himself responsible; but I am satisfied both in fact and in law, that he was well advised. As this case stands before me, the owner of the goods had bound himself in equity, and the Court would have compelled him to perform the contract, viz. to give possession of the cargo. The ship arrives, and Birnie absents himself. Upon the footing of an antecedent authority, possession is given. Laying out of the case the right of the judgment creditor, it is impossible to say that by the assignment as between the plaintiffs and Birnie, enough was not done to perfect the title. The plaintiffs went to the party in possession and obtained possession. If a purchaser has paid his purchase-money, and prevailed on the occupying tenant to give him possession, would a court of equity say that the possession was unlawful, or permit the vendor to eject him? Though this is not a purchase of the thing itself, yet it is a purchase of a right, and a transaction in respect of which the price has been paid. It appears to me, that on the 8th and 9th of January, they had clothed their equitable title lawfully with possession of the property. If in addition, it appeared that Macguffie had direct authority, that would relieve the case of all difficulty. Now comes the struggle respecting the case of the judgment creditor. The general rule of law is, that a judgment creditor can take in execution that which belongs to his debtor, and nothing else. If he could take property of which the debtor was a trustee, no trust property would be safe. The last decision was *Newlands v. Paynter* (3). Lord Cottenham there, in (3) 4 Myl. & Cr. 408.

distinct terms, affirmed that equity would protect the property. That is the general rule. If you once decide that property apparently belonging to the debtor, is protected, the only question to be tried is, whether there is an equitable interest in any other person than the debtor. If in *Whitworth v. Gaugain*, Lord Cottenham had given a deliberate judgment, I should have held myself bound by it; but he did nothing of the sort; it was a point not directly before him. All that he said was, that in that interlocutory stage of the cause, he would not go so far as to deny the right of the judgment creditor. But if that principle were followed out, I cannot see how any equitable property would be safe. But I am perfectly satisfied that Lord Cottenham never meant to throw out any such general principles. That was the case of an equitable mortgagee, by deposit of title-deeds, out of possession, and who never sought to affect the property by actual possession; and I am satisfied that I am not acting against Lord Cottenham's dictum, in saying that there is a distinction, where an equitable title is perfected by the purchaser or incumbrancer taking possession. *Doe d. Coleman v. Britain* (4), and the other cases referred to, have no direct application, but shew that a judgment creditor does not stand in the same favoured position as a purchaser. If a person having an interest and a power of appointment, conveys away part of the estate, he cannot afterwards exercise his power in derogation of the conveyance—*Skeeles v. Shearly* (5). But what I rely upon is the general principle, that there is such a contract between Birnie and the plaintiffs, as would entitle the plaintiffs to the cargo when it arrived, and the contract being perfected by possession lawfully taken, and no attempt to impeach it, that the judgment creditor cannot attach it. The only remaining question is, whether the general words of the assignment would include the chronometer.

On the following day, his Honour said, that as the vessel was on a voyage to the South Seas, and the chronometer was on board at the time of the assignment, he thought that it must pass to the plaintiffs under the general words "appendages and appurtenances."

(4) 2 B. & Ald. 93.

(5) 8 Sim. 153; s. c. 6 Law J. Rep. (N.S.) Chanc. 21.

WIGRAM, V.C. }
May 27, 28. } ADAMS v. ADAMS.

Will—Construction—Devise by Implication.

Devise by A, of real estates to trustees, upon trust, (subject to the dower of his wife J. A., and subject to the principal and interest charged thereon by mortgage or otherwise,) to receive the rents and profits, and after deducting the dower and interest on the mortgages, to pay the same for the purposes therein mentioned. There was no estate of the testator out of which the wife was entitled to dower:—Held, that those words did not by implication give the wife a right to a payment out of the estate, in the nature of dower. In such a case, the relation of the parties cannot be taken into consideration.

The testator, by his will, devised and bequeathed all his real and personal estate to trustees, upon trust, (but subject, nevertheless, to the dower or thirds at common law, of his wife J. A., and as to his real estates subject to the payment of the principal monies and interest which he, the testator, had charged thereon by mortgage or otherwise,) to receive the rents and profits, and after deducting the dower and interest on the mortgages, to pay the same for the purposes therein specified. It was referred to the Master to inquire and state whether the testator's wife was legally dowable, out of any and what real estate of which the testator died seised. The only estate out of which the widow would have been dowable, was mortgaged in fee; and the question now was, whether by that passage in the will the testator had charged his estate with any payment to his wife in the nature of a dower.

Mr. Sutton Sharpe and Mr. Jemmett, for the plaintiffs, the children, contended, that the widow was not entitled; that the words implied nothing more than "subject to all legal charges"—Wright v. Wyvell (1). That the testator had not recited that his wife was dowable; and that this was not a devise by implication.

Davis v. Davis, 1 Russ. & Myl. 645.

Jarman on Wills, vol. 1, p. 460.

Hammond v. Neame, 1 Swanst. 35.

Newland v. Shephard, 2 P. Wms. 194.

Bird v. Hunsdon, 2 Swanst. 342.

Crowder v. Clowes, 2 Ves. jun. 449.

Dashwood v. Peyton, 18 Ibid. 27.

Ralph v. Watson, 9 Law J. Rep. (N.S.)
Chanc. 328.

Mr. Bird, for a child defendant.

Mr. Girdlestone and Mr. Sandys, for the widow.—All the parties in question take under the will, and can only take what the testator has given them. In *Wright v. Wyvell*, the will describes the wife as already estated.

Mr. Sutton Sharpe, in reply.—In the case in *Ventris*, somebody must have had the estate, to make the payments.

WIGRAM, V.C.—This is a hard case, and I have no doubt of the intention of the testator. But the question in all the cases is, whether the testator has "given" anything, for there must be a gift by express words or plain implication; otherwise the Court cannot decree that it is a gift. Wherever the testator recites that he has given, though there is no gift, the Court will hold the recital evidence in writing of the gift, and fasten upon it, where the will itself furnishes evidence that the testator intended to give. But wherever there is a declaration in a will, that a testator supposes a party to have an interest, the circumstance that he recites that, is conclusive evidence that he did not mean to give; for he considered there was no necessity for giving. In all those cases where there is no recital of his having given, but a recital that a party has an interest independent of his declaration, the course of the decisions is, that the Court cannot imply a gift. The cases are collected in 1 *Jarman on Devises*, 460. In *Dashwood v. Peyton*, Lord Eldon disapproved of *Tilly v. Tilly* (2). *Ralph v. Watson* is an authority to the same effect. Suppose the case of a testator giving an estate to A, after payment of a debt of 1,000*l.* to B. If no debt was owing to B, the testator could not be held to intend to give him 1,000*l.* The same principle applies to a case of deduction. Here, it being a deduction of the dower of the wife, there is a strong case of intention. But change the case of the wife, and suppose

a creditor ; you could not apply the same principle. The question is, whether I can look at the relation of the parties, and alter the plain construction of the words. I am of opinion, that I ought not to do so. As the children are so nearly of age, I hope the widow will not be deprived of a provision.

WIGRAM, V.C. }
May 27, 30. } BOND v. GRAHAM.

Parties—Account—Executor—Will—Foreign Probate.

A, by his will, made in India, appointed B, C, and D, his executors. B. renounced, and C. and D. proved the will in India, and both acted and received the assets. D. being about to come to England, rendered an account of his receipts and payments, and handed over the balance to C, who then continued to act as sole executor in India. C. afterwards remitted to D. in England, a sum of rupees, part of the estate, and for the purposes thereof, and died. On a bill by the residuary legatee of A. against D, for an account, and payment of the sum so remitted :—Held, that D. must be taken to have received that sum as executor, and not as agent or trustee ; and, consequently, that he was entitled to have the accounts taken generally, and that a legal representative in this country was necessary.

This was a bill by the residuary legatee, under the will of a testator, who died in India, against the surviving executor, who had proved the will in India, to compel him to account for a sum of money remitted to him from India, by his co-executor, after his arrival in England ; and the question was, whether the plaintiff had a right to call for this account, without having a personal representative of the testator duly constituted by probate in this country.

Mr. Teed, for the plaintiff.

Mr. Ellison and *Mr. Stinton*, for the executor, cited—

Tyler v. Bell, 2 Myl. & Cr. 89 ; s. c. 6 Law J. Rep. (N.S.) Chanc. 169.

Logan v. Fairlie, 1 Myl. & Cr. 59.

Lowry v. Fulton, 9 Sim. 104 ; s. c. 7 Law J. Rep. (N.S.) Chanc. 158.

The statement in the bill and answer are fully given in His Honour's judgment.

May 30, 1842.—WIGRAM, V.C.—The question in this cause was, whether I could make a decree in the absence of the legal personal representative of the testator. The plaintiff is the residuary legatee under the will of a testator, who, by his will, appointed three persons his executors—viz. Graham, Cartwright, and M. The testator was in India at the time of his death, and also his three executors. M. renounced probate, and Graham and Cartwright proved his will there, and both acted in the trusts of the will, though Cartwright was the principal acting executor. In December 1838, Graham being about to come to England, accounted with Cartwright for his receipts, and handed over to him the money in his hands. On the 15th of April 1840, Cartwright remitted to Graham in England, the sum of 181,000 rupees, part of the estate, and shortly afterwards died, and Graham then became the sole executor under the Indian probate ; but no probate was taken out in this country. The bill, as it originally stood, prayed a general account of the testator's estate, but that was struck out by amendment, and it now prays only that Graham might account for the 181,000 rupees, remitted to him in this country by Cartwright. It was insisted, that this account might be taken without having a personal representative duly constituted by the Prerogative Court of this country. Graham, by his answer, says, that he is still liable as executor to the parties beneficially interested under the will ; that in order to his complete discharge, both as against creditors and others, he has a right to have such a decree made as will involve an account of the testator's estate, and relieve him from all liability, and he insists that that cannot be done except the estate is duly represented. The sole question is, whether a representative constituted in India, is sufficient for the purposes of this suit. I am clearly of opinion, that it is not sufficient. If the executor or administrator has so dealt with the fund, that by reason of such dealings, he has ceased to bear the character of executor, and assumed the character of a trustee of the fund ; if he has taken a sum out of the estate of the testator, and appropriated it to the *cestui que*

trust, it is not necessary for the *cestuis que trust* to bring before the Court the personal representatives of the testator, in a suit against the trustee. If the character of the property is not altered, if it still remains part of the estate, the will which the Court is called upon to recognize must be a will authenticated by probate in this country—*Tyler v. Bell*, *Twyford v. Trail* (1). In considering the question, whether it has assumed the new character of a trust fund, it is not conclusive against the fact, that the fund is found in the hands of a surviving executor—*Phillipo v. Munnings* (2); but it renders the proof of the alteration of the property more difficult than if it had passed into new hands. The defendant insists, that he holds the funds as executor; and the only question is, whether upon the pleadings, you can shew that the property is altered, and the defendant concluded from saying, that he holds it as executor. But, from the answer, it is quite impossible to say he holds it as trustee: he says, he has proved the will, acted under it, and become accountable; that, being about to proceed to England, he rendered an account to Cartwright, and gave up to him all the papers, &c.; that Cartwright then proceeded to act as sole executor; that on the 15th of April 1840, Cartwright remitted to him the fund, and sent defendant an account of his receipts and payments. In what character was this sum remitted to him? It is said, because he was in England; that shews nothing as to the character; he says, moreover, that Cartwright did not in his lifetime account to him for all his receipts and payments in any other manner than by remitting the stock, receipts, &c.; but that he believes that such accounts are true and correct, and that only a small balance was in the hands of Cartwright at the time of his death. It is too much to say, that he is not executor, and that a settlement between the residuary legatee and himself could discharge him; all the passages in the answer go to the fact, that he holds the property as part of the testator's estate. The cause must stand over for the plaintiff to obtain a representation in this country.

(1) 7 Sim. 92.

(2) 2 Myl. & Cr. 309.

WIGRAM, V.C. }
June 3, 7. }

BROWN v. PERKINS.

Plea—Agreement for Compromise—Averment of Satisfaction—Account.

A plea of accord must aver satisfaction.

To a bill for an account by the executors of *A. B.*, a deceased partner, against the survivor, the defendant pleaded, that the partnership between the defendant and *A. B.* was dissolved by reason of the misconduct of *A. B.*; and that by the terms of the partnership articles, *A. B.* was not, in such an event, to practise as a solicitor, &c., at *M. T.*, for seven years following, under a penalty; that after the dissolution and a reference to arbitration, defendant and *A. B.* came to an agreement for putting an end to the reference and all disputes between them, on the terms, that all accounts between defendant and *A. B.*, and all claims of *A. B.*, in respect of the estate, &c. of the late partnership, and the debts due to and from the same should be waived; and that in consideration thereof, *A. B.* should be permitted to practise at *M. T.*; and defendant averred, that *A. B.* did thereupon so practise till his death. *Plea overruled*, on the ground, that it ought to have gone on to aver, that no liabilities of the partnership were outstanding, in respect of which the testator's estate could be affected.

Quære—Whether to a bill for an account a plea of an agreement of compromise, not averred to be in writing, is good.

The plaintiffs, in this suit, were the personal representatives of *C. Brown*, deceased, who was formerly in partnership with the defendant, *W. Perkins*. The bill stated, that by articles of partnership of the 18th of March 1836, *Brown* and *Perkins*, (who were respectively practising as solicitors at *Merthyr Tydvil* and *Cardiff*.) agreed to become partners for the term of ten years, the profits to be divided as therein specified. In the said agreement there was a proviso, that if either of the partners should become bankrupt, or do any act whereby he might become liable to be struck off the rolls, &c., then it should be lawful for the other to dissolve the partnership by a notice in writing, &c.; that if *Brown* should perform his duties negligently, or should draw any bills of exchange in the name of the partnership without the consent of *Perkins*,

or receive any money without accounting for the same, or do any act whereby the partnership might be charged, or engage in any other trade, then it should be lawful for Perkins to determine the partnership; and if the partnership should be dissolved by Perkins, by reason of the misconduct of Brown, or be ordered to be dissolved by any Court, &c., Brown should not be at liberty to act as an attorney, solicitor, or conveyancer, at Merthyr Tydvil, or within twenty miles thereof, for the period of seven years after such dissolution, under a penalty of 1,000*l.* liquidated damages. The bill then alleged, that the partnership commenced under the articles, and that Brown had in all things conformed himself to the partnership articles, but that, in March 1837, differences arose, and on the 18th of November 1837, the partnership was dissolved by mutual consent: that on the 10th of December 1837, Perkins and Brown entered into an agreement, by which, after reciting that differences had arisen as to their respective rights and qualities of co-partners, touching the estate, monies, and effects of the partnership, and also concerning the conditions of the dissolution of the partnership, they agreed to refer the matters in dispute between them to the arbitration of A. & B, who consented to undertake the same, but that the arbitration failed by reason of Perkins not delivering to the arbitrators the necessary accounts; and that, consequently, no award was made; that at the time of the dissolution, considerable sums of money were due to Brown, which had never been paid, though frequently demanded; that in 1841, Brown died, having by his will appointed the plaintiffs his executors, who duly proved the same; that no settlement of the partnership accounts was come to during the lifetime of Brown.

The bill then prayed an account of the partnership dealings, from the date of the articles to the dissolution, and of the monies received by Perkins, both before and since the dissolution, and for payment of what was due to the testator's estate; the plaintiffs offering to pay out of the testator's assets what, if anything was due to Perkins; and for a receiver and an injunction to restrain the defendant from collecting or receiving the partnership assets. To this bill the defendant put in the following plea, "That among

the differences and disputes which had arisen, and were depending between the defendant and C. Brown, and which, by the agreement for reference, were referred to A. and B, was a claim of this defendant, as follows, that is to say, he, this defendant, claimed and insisted that the partnership between this defendant and C. Brown, had been dissolved by reason of the misconduct of Brown, and that Brown was not, therefore, at liberty for the term of seven years after such dissolution, to act in the profession of an attorney, solicitor, or conveyancer at Merthyr Tydvil aforesaid, or within twenty miles thereof. And the defendant then averred, that after the agreement for reference, and some time in the year 1838, Brown, by his agent E. S, and this defendant, came to an agreement for putting an end to the said reference, and to all disputes and questions whatsoever between them; and it was thereon agreed, that all accounts between Brown and the defendant, and all the claims of Brown, in respect of the estate, money, and effects of the late partnership, and the debts due to and from the same, should be *waived*, and that in consideration thereof, Brown should be permitted to practise as a solicitor at Merthyr Tydvil aforesaid, without any further question or dispute on the part of this defendant; and the defendant further averred, that in pursuance of the said agreement, Brown did practise thenceforth to the time of his death, as such solicitor and attorney, at Merthyr Tydvil aforesaid, without any further question or dispute on the part of this defendant.

The plea now came on to be argued.

Mr. Girdlestone and *Mr. W. M. James*, for the plea.—The question is, whether this plea discloses a sufficient consideration for the agreement; for unless it is a *nudum pactum*, it is a complete bar to the plaintiffs' claim—1 *Vin. Abr.* pl. 25, 26, 27, 28.

Longridge v. Dorville, 5 B. & Ald. 117.

Stracy v. Bank of England, 6 Bing. 754;

s. c. 8 Law J. Rep. (n.s.) C.P. 234.

Wilkinson v. Byers, 1 Ad. & El. 106;

s. c. 3 Law J. Rep. (n.s.) K.B. 144.

Atlee v. Backhouse, 3 Mee. & Wels. 633;

s. c. 7 Law J. Rep. (n.s.) Exch. 234.

Skeate v. Beale, 3 Per. & Dav. 597;

s. c. 9 Law J. Rep. (n.s.) Q.B. 233.

Naylor v. Winch, 1 Sim. & Stu. 555;

s. c. 2 Law J. Rep. Chanc. 132.

Mr. Sutton Sharpe and Mr. Romilly, for the bill.—Every defence that can be made to a claim cannot be set up by way of plea. All the books lay down, that to a bill for an account, you can only plead a stated account or a release—*Gilb. For. Rom.* 55. A stated account must be in writing; a release must be pleaded as under seal; but a release not under seal may be pleaded as a stated account—*Mist. Pl.* 213, (3rd edit.) *Beames Pl.* 221. If the defendant cannot do either of these things, he must make his defence by answer. It is not pleading with sufficient precision to state that the accounts have been *waived*, not stating by whom. The pleader should have supplied the necessary precision by an averment, if the agreement was not sufficiently precise in itself—*Rowe v. Wood* (1). A stated account by parol may be a good defence by answer, but not by plea.

Leonard v. Leonard, 1 Ball & B. 324.

Jackson v. Rowe, 4 Russ. 514; s. c. 9 Law J. Rep. Chanc. 32.

Sewell v. Bridge, 1 Ves. sen. 297.

2 Dan. Chanc. Prac. 187.

Where the defence consists of a variety of matters, there is no use of a plea, for the examination is still at large. There are three issues tendered by this plea;—first, that the right of practising at Merthyr Tydvil was a matter in dispute between the parties; which is contradicted by the averments in the bill;—secondly, that E. S. was the agent of Brown;—thirdly, that Brown entered into an agreement to waive the accounts in consideration of being allowed to practise. As the partnership was dissolved by mutual consent, there was no restriction on the right of practising, and, therefore, no consideration for waiving the accounts.

Mr. Girdlestone, in reply.—Even if an agreement “in writing” must be pleaded, (though no case lays that down), yet this is a parol contract part performed.

June 7.—WIGRAM, V.C.—At the time of Brown's death, the partnership account had not been settled, and the right to an account remained open, unless the argument for the defendant is right, that the plea of the agreement is a good bar. The plaintiffs pray an account of the partnership dealings and transactions, offering out of the assets of the testator to pay

what, if anything, should be found due to the defendant, on the joint concern. To this bill the defendant has pleaded this plea, (*vide plea, supra*). For the plaintiffs it has been argued, that the substance of the plea is not available as a defence by way of plea; though, if set up by answer, it might be an absolute bar. This argument did not proceed on the ground that the plea did not reduce the question to a single point; but it is alleged, that some technical rule precluded the defendant, because the agreement is not alleged by the plea to be in writing. According to this argument, if the alleged agreement had been performed by both parties, and the question between the parties had been reduced to a single point, and the plea had been formal, the defendant would be compellable, at the will of the plaintiffs, to go into his defence at large, subject to the inconvenience of that mode of defence. As my judgment in this case does not require that I should express any opinion on this reasoning, I shall abstain from saying more, in order that the case may not be prejudiced. The question on the argument of the plea is, whether, if the case were now at the hearing, I must of necessity, upon the matters of the plea, dismiss the bill? The second point was, that the agreement was uncertain in its terms. It has been decided, that a plea of accord is bad, unless performance is shewn—*Com. Dig.* tit. ‘Accord.’ I should be reluctant to decide it upon the ground of uncertainty, though there is a difficulty in putting a definite legal construction upon it, as saying, that it is an agreement that all the claims of the plaintiffs' testator should be given up and the accounts waived; but I think the agreement may be easily understood as saying, that the defendant would take upon himself the payment of the whole of the partnership engagements and liabilities; and my judgment in this case will give the defendant the benefit of that supposition. Upon this supposition, the defendant might have pleaded the agreement with an averment, that no engagements or liabilities of the partnership remained outstanding and undischarged at the dissolution, or that such, if any remained, had been since discharged, and that no liabilities now remained in respect of which the estate of the testator could be affected. But there is no such averment, and that leaves the case open to the intendment, that the estate of the testa-

(1) 1 Jac. & Walk. 315.

tor may still remain liable in respect of the partnership transactions. The rule of law upon this subject is settled, that is, that an agreement or accord cannot be pleaded in bar to a bill without pleading satisfaction also—*Com. Dig.* tit. 'Accord.' It is the performance which constitutes the satisfaction. If I were to allow this plea, I should rule that an agreement pleaded was a plea of satisfaction, whether it was performed or not. The defendant may have the benefit of the same defence by answer, offering to perform the agreement, so far as it is unperformed.

Plea overruled.

WIGRAM, V.C. }
June 2, 3, 7. } LLEWELLYN v. BADDELEY.

Discovery — Valuation — Protection — Affidavit.

An answer admitted various documents, without claiming any protection. On a motion for their production, the defendants were allowed to specify by affidavit those which he claimed to withhold, and the grounds of exemption.

After the litigation commenced, the defendants, the vendors, had procured a valuation of the estate, and specified the valuation as a document in their possession:—Held, that the plaintiff was not entitled to its production, it not being evidence, but only a minute of evidence.

This was a suit by a purchaser against the vendors (trustees) for specific performance. It appeared, that the defendants intending to rest their defence on the ground of inadequacy of consideration, had, after the bill was filed, procured the estate to be valued, and in the schedule to their answer, they set out the valuation and various letters, &c., as documents in their possession, but without claiming any protection by the answer.

On notice of motion being given for the production of the documents admitted by the answer, the defendants made an affidavit that some of the letters (specifying them) were privileged communications, and that the valuation in particular was evidence on the part of the defendants, and formed no part of the plaintiff's case.

Mr. Lloyd now moved for the production, and cited—

Storey v. Lord G. Lennox, 1 Myl. & Cr. 525; s. c. 6 Law J. Rep. (N.S.) Chanc. 99.

Whitbread v. Gurney, You. 541.

Greenlaw v. King, 1 Beav. 137; s. c. 8 Law J. Rep. (N.S.) Chanc. 92.

Mr. Lewin, contra, as to the valuation, cited *Tyler v. Drayton* (1). As to the affidavit—

Parsons v. Robertson, 2 Keen, 605; s. c. 7 Law J. Rep. (N.S.) Chanc. 1.

Hughes v. Biddulph, 4 Russ. 190.

[*Mr. Lloyd*.—There the affidavit was not objected to.]

Preston v. Carr, 1 You. & Jer. 175.

Micklethwait v. Moore, 3 Mer. 292.

WIGRAM, V.C.—The bill in this case contained the usual charge as to the possession of documents. The answer admits the documents, and purports to give a schedule of them, but suggests no reason why they should not be produced. The admission of relevancy is sufficient, unless some ground is shewn why they should not be produced—*Tyler v. Drayton*, *Storey v. Lord G. Lennox*. The defendants, on the motion, produced an affidavit, in which they stated that certain documents in the schedule related exclusively to the title of the defendants. Secondly, that some of the letters were privileged, as being communications between the defendants' solicitors and other persons. With respect to this one document, it appears, that on the 11th of February there was a valuation of the estate in question by W. S. In the affidavit by the defendants, it is stated as follows:—"That in consequence of the alleged contract being for 7,444*l.*, and another person having made an offer of 10,000*l.*, the defendants, the trustees, (various disputes having arisen,) with a view to ascertain the real value of the estate, caused it to be valued by a surveyor, and that his report was the document mentioned in the schedule to the answer, and that the same formed a material part of the evidence of the defendants, and formed no part of the plaintiff's case." The plaintiff contends, first, that this affidavit cannot be received; secondly, that if received, it is

insufficient. With respect to the first point, if it was new, I should be inclined to adopt the plaintiff's argument. I cannot understand why the defendants are not bound to produce documents, unless they specify in their answer some ground for not doing so, or why they should be allowed to make a new case by affidavit. But the point is not new. There are authorities for allowing affidavits for such a purpose, applicable almost to every ground that can be suggested. In *Tyler v. Drayton*, Sir J. Leach says, that a defendant is bound to produce all deeds, &c. in his custody or power, relating to the matters in question, as of course; unless it appeared by the description of any particular instrument in the schedule, or by affidavit, that it was evidence not of the title of the plaintiff, but of the defendant, or that the plaintiff had otherwise no interest in its production. In *Hughes v. Biddulph*, the defendant resisted the production of the documents, and was allowed by affidavit to protect those for which the privilege was claimed. In *Parsons v. Robertson*, the question was dealt with in the same way. In *Morrice v. Swaby* (2), liberty was given to the defendant by affidavit, to relieve himself from the effect of an admission in his answer. In *Curd v. Curd* (3), the defendant wished to shew by affidavit, the particular parts of the documents he wished to be sealed up, and I gave him leave to file such affidavit. My decision in that case was confirmed on appeal, (March 8, 1842.) In *Hughes v. Biddulph*, *Morrice v. Swaby*, and *Curd v. Curd*, the affidavit was not filed at the time of the motion made. I mention this, because this affidavit is not sufficient to protect the documents sought by the motion. Secondly, with respect to the letters in the schedule, the defendants must produce all those except such as are similarly situated to those mentioned in the order in *Hughes v. Biddulph*. The only part of the case on which I felt any difficulty was, as to the documents that were made after the dispute arose, when the defendants, being about to prove that the estate was worth more than double what the plaintiff contracted to give, send a surveyor to value the estate; the valuation is made, and the defendants swear that this particular docu-

ment constitutes the evidence of their case, and does not support the case of the plaintiff. The question is, whether as a solicitor was not called in to interpose, the document is protected. With respect to the valuation, it is not evidence of the defendants' case, for it is not evidence at all, but a minute of evidence which the defendants have procured, and I think it is protected—*Curling v. Perring* (4), *Preston v. Carr*. My decision does not conflict with *Whitbread v. Gurney*, *Storey v. Lord G. Lennox*, or *Greenlaw v. King*. Those cases merely decide, that every document that has arisen since the dispute, and with reference to it, is not necessarily privileged. I think those decisions correct; but there may be many documents which might be privileged, without calling in aid professional confidence. This point was saved in *Storey v. Lord G. Lennox*, and that decision was called for by the nature of the case. I could not order a discovery of this document, without deciding that the defendants are to give a discovery of the whole of the evidence to be given by each of their witnesses. The decisions go to this, that each party has a right to know the whole of his opponent's case, but not the evidence by which he means to support it. I decide only upon the evidence before me, that this document stands in the position of a document relating exclusively to the defendants' case. If the plaintiff had got an admission that the valuation would help the plaintiff's case, then the doctrine of *Bolton v. the Corporation of Liverpool* (5) might apply. My impression of *Storey v. Lord G. Lennox* was, that Lord Cottenham considered that the privilege depended upon the grounds upon which the document was obtained, and not exclusively upon the character of the person obtaining it. Lord Brougham's reasoning in *Greenough v. Gaskell* (6), and Lord Langdale's in *Greenlaw v. King*, tend to the same conclusion. I think this document is privileged; the plaintiff only wants it, to see the evidence upon which the defendants mean to support their case.

(4) 2 Myl. & K. 380; s. c. 4 Law J. Rep. (n.s.) Chanc. 80.

(5) 1 Ibid. 88; s. c. 1 Law J. Rep. (n.s.) Chanc. 166.

(6) Ibid. 98.

(2) 2 Beav. 500.

(3) 1 Hare, 274.

WIGRAM, V.C. }
June 25, 27. } HODGSON v. GREEN.

Legacy—Trust.

*Testatrix, by her will, directed her trustee to pay 1,000*l.* into the hands of C. H., to be laid out by him in the education of his two eldest sons, who should be alive at testatrix's death; if only one son, then 500*l.*, for the like purpose; if no son of C. H. living at her death, she directed the legacy in his favour to fall into the residue. C. H. died before the testatrix, leaving two sons living at her death:—Held, that the legacy was not an absolute gift to C. H., but a trust to some extent for the sons, and therefore the limitation over did not take effect by the pre-decease of C. H.*

The testatrix, by her will, gave to A. B. all her personal estate, upon trust to convert it into money, and to pay out of the proceeds certain legacies mentioned therein, and upon further trust to pay into the hands of Colonel Hodgson 1,000*l.*, to be laid out by him in the education of his two eldest sons, who should be alive at the testatrix's decease; but, in case there should be only one such son, then to pay 500*l.* to Colonel Hodgson, to be laid out in the education of such only son; and in case there should be no son of Colonel Hodgson living at her decease, then she directed, that the legacy given in his favour, should fall into the residue.

Colonel Hodgson died in the lifetime of the testatrix; and the question raised was, whether this direction was a gift to Colonel Hodgson for his own benefit, and lapsed by his death, or whether it was a trust for his children.

Mr. Girdlestone and *Mr. Elderton*, for the children of Colonel Hodgson, contended, that it was a trust for the children, and by the words of the will, was not to fall into the residue, except on the death of the two sons before the testatrix.

Woods v. Woods, 1 Myl. & Cr. 401.

Foley v. Parry, 5 Sim. 138; s. c. 2 Myl. & K. 138.

Jubber v. Jubber, 9 Sim. 503.

Soames v. Martin, 10 Sim. 287; s. c. 8 Law J. Rep. (N.S.) Chanc. 367.

Kilvington v. Gray, Ibid. 293.

Wetherell v. Wilson, 1 Keen, 80; s. c. 5 Law J. Rep. (N.S.) Chanc. 235.

Mr. Sharpe and *Mr. Rolt*, for the residuary legatee.—The testatrix intended, that whatever the children took, they should take through their father. If the testatrix meant the children to have it, at all events, she would have provided for the prior decease of the parent. All the cases cited, are between the parent and child; this is between the residuary legatee and the children.

Benson v. Whittam, 5 Sim. 22.

Bardswell v. Bardswell, 9 Sim. 319; s. c. 7 Law J. Rep. (N.S.) Chanc. 268.

The testatrix herself calls it a gift "in his favour." If it was a legacy to an aunt to bring up nephews or great-nephews, then the Court would infer that the nephews were the objects of bounty, and not the aunt; but here, there is an obligation on the parent to maintain the children at all events; and the question is, whether the children were not merely inducements to the bounty. This is a legacy more in the nature of a legacy to pay a debt which the parent owes.

Barlow v. Grant, 1 Vern. 255.

Saunders v. Nevil, 2 Ibid. 428.

Barton v. Cooke, 5 Ves. 461.

Leche v. Lord Kilmorey, Turn. & Russ. 207.

In *Hamley v. Gilbert* (1), the Master of the Rolls referring to that class of cases, says, "If 10,000*l.* were given to purchase him a commission in the army, it would be more than could be applied to that purpose. He would be entitled to a commission, but to nothing further." *Foley v. Parry* was the case of a great-nephew—*Hammond v. Neame* (2).

Mr. Girdlestone, in reply.—If the Court would compel the legatee to educate his children, then this is not an absolute gift to him, but a trust in favour of his sons.

Raikes v. Ward, ante, p. 276.

Crockett v. Crockett, ante, p. 117.

WIGRAM, V.C.—I will first consider how the case would be, if Col. Hodgson had survived the testatrix. I have always understood the general rule to be, that where a legacy is given to a person to enable him to do a particular act, that is a gift for the benefit of the legatee, and not a trust, even

(1) Jac. 358.

(2) 1 Swanst. 35.

though the thing to be done is for the advantage of a third person—*Hammond v. Neame, Benson v. Wittam*. In other cases, there is a difficulty, that is, where property is given to a person to enable him to maintain himself and his children, which apparently points out that the children are direct objects of the testator's bounty. These are argued to be in the same position, and the argument was enforced by this, that the Court cannot decree it a trust, because the amount is unascertained. Those reasons did appear to me to raise great difficulty in the way of a decision. As far as the maintenance of the children is concerned, these are duties and objects which the Court can measure. In the late cases of *Raikes v. Ward and Crockett v. Crockett*, I was perfectly satisfied, that where there is a declaration that money shall be applied for maintenance, the Court ought, and will measure the trust, and the Court in those cases gave the children the benefit of the legacy. Having considered the subject in those cases, I have heard nothing now to induce me to alter my opinion. If a benefit is given to the children, the logical conclusion is inevitable, that the Court must decide that there is a trust to some extent in favour of the *cestuis que trust*. I do not know how to escape from that conclusion. The Court, in *Woods v. Woods*, decided that the *cestuis que trust* took from the beginning a positive interest in the testator's estate. As far as the words of the will go, they are much more favourable to imply a trust, than any of the cases cited, because, though the legacy is to be paid into the hands of the legatee, yet it is to be laid out by him in the education of his two sons, &c. If no son is living at the decease of the testatrix, then it is to fall into the residue. All that I shall decide at present is, that the sons of Colonel Hodgson take some interest in the legacy in question.

WIGRAM, V.C. } PORTLOCK v. GARDNER.
JUNE 22, 24, 25, 29. }

Executor—Nonfeasance—Lapse of Time—Constructive Trustee—Partnership—Account.

An acquiescence of twenty-three years with a knowledge of the will, is a good bar

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to a claim by a residuary legatee, against an executor for an account, on the ground of neglect or misfeasance; and that independently of the 3 & 4 Will. 4. c. 27.

A, who under the will was to be a partner with B, the residuary legatee, in the testator's business, and to have a moiety of the profits, but to whom no part of the stock in trade, &c. was given, under a power of attorney from the executor, received the assets, and paid debts, &c., and in 1817 settled an account with B, on the footing that he, A, was entitled to a moiety of the balance appearing on such account, and afterwards carried on the trade on his own account, in the same premises, till his death in 1838. On a bill by B. in 1840, to charge A's executors with a moiety of the profits of the trade:—Held, that though A. had received the assets under the authority of the executor, and with the knowledge that they were trust property, yet as the permitting him so to receive them was not necessarily a breach of trust on the part of the executor, A. must be held but a constructive trustee, and as such not chargeable with the profits of trade after so long acquiescence.

Secus—If A. had received the assets, concerting a breach of trust with the executor.

As the settlement of 1817 was erroneous on the face of it, the bill was dismissed without costs.

J. Portlock, the testator, a gun-maker, at or near Birmingham, and entitled to property consisting of the stock in trade and good will of his business, and to certain beneficial contracts with the Board of Ordnance, died in 1810, and by his will, after directing his debts to be paid, and giving certain legacies, and directing a sale of certain portions of his property, proceeded as follows:—"In case of any overplus, I give it to Thomas Portlock, who resides in my house, to enable him to carry on, and for the use of my trade; and furthermore, I give and bequeath to my friend Thomas Davis, in trust, all my stock in trade, tools, and implements thereto belonging, for the undermentioned purposes: that he give the trade to my nephew Thomas Portlock and J. Turton, the profits of which shall be divided between them, share and share alike, so long as the said J. Turton shall think proper to work and continue a co-partner with the said T.

Portlock, and no longer ; and I give the said Thomas Portlock all my tools, stock in trade, and implements thereto belonging, to enable them to carry on the said trade, which shall be valued ; and if the said J. Turton wishes to take half of the said stock and tools, he must pay to the said T. Portlock in money, or allow it out of his share of the profits, according to the said valuation ; and I leave this to his discretion. The said T. Portlock's legacy nevertheless is and shall be upon the condition, that he behaves himself in a steady, orderly, and upright manner, and always abide by the direction of my friend Thomas Davis ; and if he does not, it is my desire that the said Thomas Davis do divide all his said legacy, and all and every interest in this my last will and testament, among my relations, share and share alike. The said trade to be carried on under the firm of T. Portlock and J. Turton ; and the said trade, for their joint interest, shall be conducted and managed by the said Thomas Davis ;" and the testator appointed Davis and T. Gardner his executors, and directed that Davis, immediately after his death, should take possession of his house and premises, which were held on lease, for the purpose of carrying on the said trade for the said T. Portlock and J. Turton. In 1840, Thomas Portlock, the nephew, filed his bill against Gardner, the executor of J. Portlock, and against the executors of Turton, stating, that at the decease of the testator, the plaintiff was of the age of fifteen years ; that the will was proved by Gardner alone, Davis having renounced probate ; that no information was furnished to the plaintiff of his rights under the will, but that the defendant Turton had full knowledge of the will, and especially of the trusts in favour of the plaintiff ; that immediately after the death of the testator, Turton, with the consent of Gardner, possessed himself of the stock in trade, business, &c., the property of the testator, and received the whole of the testator's assets ; that Gardner, after the decease of the testator, executed to Turton a power of attorney, authorizing him to collect the assets ; that under that power, Turton possessed himself of the assets, and paid the debts and legacies, and retained to himself the surplus, and employed the same in his trade ; that at the time of the decease of the testator, Turton was in humble cir-

cumstances, but by means of the testator's assets, continued the business at the testator's manufactory ; that plaintiff continued to work as a journeyman with Turton till his death in 1838. The plaintiff claimed to be entitled under the will to the trade, the stock in trade, tools, and the clear residuary estate of the testator, and to a moiety of the accruing profits since the death of the testator. The bill further alleged, that Turton and Gardner kept the plaintiff in ignorance of his rights under the will, and never accounted with him for the said trade, stock, &c., but that Turton retained the same to his own use ; that in November 1838, Turton died, and by his will appointed the defendants, Osborne and A, his executors ; that plaintiff first knew of his rights in 1839, and thereupon called on Turton's executors for an account. The bill prayed an account of the personal estate of the testator J. Portlock, received by Gardner or Turton, and that Gardner, and the executors of Turton, out of their testator's assets, might be held accountable for the same ; and that it might be declared that the plaintiff was entitled to the residuary estate of the testator J. Portlock, and to a moiety of the clear profits of the trade, from the death of the testator J. Portlock, and to interest on the testator's capital invested therein ; and that Gardner and the executors of Turton were liable for such profits ; and that an account might be taken of the personal estate of Turton, in case assets should not be admitted.

Gardner, by his answer, stated that he gave the power of attorney to Turton to collect the assets, and that he never possessed any of the assets himself ; that in 1816, the plaintiff came of age, and that in 1817, plaintiff and Turton came to account, that Turton on that occasion drew out an account of all his receipts and payments, and that the balance on such account appeared to be 317*l.* 14*s.* 8*d.*, and that balance was equally divided between plaintiff and Turton, on the footing of such being their respective rights under the will ; and that such account was signed, at the foot thereof, by Turton and the plaintiff.

The following was the agreement at the foot of the account :—

"1817, April 10.—Agreed between Mr. J. Turton and Thomas Portlock, that 100*l.*, part of the above sum, shall be left at in-

terest in Mr. Turton's hands, at 5l. per cent., from Christmas last, and that the remaining sum of 45l. 17s. 4d., shall forthwith be paid to Thomas Portlock.—(Signed) Joseph Turton, Thomas Portlock.—(Witness) W. Gardner."

The plaintiff at the bar waived all relief except as to the profits of the trade.

Mr. Sharpe and *Mr. Beavan*, for the plaintiff.—The acts of Turton under the power of attorney, are the acts of the executor, and so far Gardner is responsible. The whole of the residuary estate belonged to the plaintiff, though it was to continue in the trade for the benefit of Turton; and Turton was to account to plaintiff for a moiety of the profits. Turton, therefore, must be held to be a trustee, carrying on the trade of the testator with the property of an infant, to his death in 1838, up to which period, time will not run against the plaintiff—*Wedderburn v. Wedderburn* (1). Adverse possession can only begin when the relation of trustee and *cestui que trust* ceases. Here, information has been fraudulently withheld—*Trevelyan v. Charter* (2).

Mr. Spence and *Mr. Menteith*, for the defendant Gardner.—The only duty of the executor under the will, was to see that the surplus went into the trade; his duty then was at an end. Gardner never interfered with the trade, and Davis, who was named as a trustee of the trade, refused to act. That the sum stated in the account was the true balance, was never disputed from 1817 to 1840; therefore, the Statute of Limitations is a bar to the plaintiff's claims. 3 & 4 Will. 4. c. 27. s. 40. is a bar to a claim for a legacy out of personal estate—*Sheppard v. Duke* (3), and also to a gift of residue.

Prior v. Horniblow, 2 You. & Col. 200.

Phillipo v. Munnings, 2 Myl. & Cr. 315. The plaintiff had full notice of the circumstances in 1817.

Chalmer v. Bradley, 1 Jac. & Walk. 51.

Pickering v. Lord Stamford, 2 Ves. jun. 583.

Beckford v. Wade, 17 Ves. 87.

(1) 2 Keen, 722; s. c. 4 Myl. & Cr. 41; 8 Law J. Rep. (N.S.) Chanc. 177.

(2) 4 Law J. Rep. (N.S.) Chanc. 209.

(3) 9 Sim. 567; s. c. 8 Law J. Rep. (N.S.) Chanc. 228.

Hercy v. Dinwoody, 4 Bro. C.C. 257.

Morse v. Royal, 12 Ves. 374.

Campbell v. Graham, 1 Russ. & Myl. 453; s. c. 9 Law J. Rep. Chanc. 234.

Mr. J. Russell and *Mr. Wright*, for the representatives of Turton.—The case of *Wedderburn v. Wedderburn* does not apply, as Turton stands in no relation of privity with the estate. At most, it would be a constructive trust, and that cannot be held a ground for an account, after so great a lapse of time. Turton could neither read nor write, and the plaintiff for all those years kept the accounts, and was cognizant of every transaction.

Mr. Sharpe, in reply.—It is impossible to say that Turton entered adversely upon an infant's property; he entered under the will, and must be charged as a direct trustee.

June 29.—WIGRAM, V.C.—I reserved my judgment in this case, in order that I might consider whether, if I should refuse any part of the relief sought, I might not be disregarding that class of cases which were cited in *Willett v. Blanford* (4). Under the will, there is no gift of the leasehold house and garden, except for the purposes of the trade—no gift of the residue, except it can be implied from circumstances. These observations are not unimportant, in considering the conduct of the parties afterwards. As between the plaintiff and Turton, there is no question but that the whole was given to the plaintiff; no pretence for saying that Turton took anything but the profits of the trade. Davis renounced probate, and Gardner proved the will, though it appears that he trusted Turton to collect the assets and pay the debts and legacies. Gardner never acted except in proving the will. Turton continued in possession of the trade, and of the profits, down to the day of his death in 1838. At the time of the testator's death, there were two contracts with government for the supply of gun-barrels, one to the extent of 825l., the other 711l. 8s. 10d.; for both these sums of money the estate of the testator had credit; but the estate had no credit for the other profits of the trade.

(4) *Ante*, p. 182.

The bill prays, that the defendant may be decreed to account for a moiety of the profits of the trade, from the death of the testator. All relief, except on account of the profits of the trade, was waived at the bar. In order that the grounds of my judgment may be understood, I will suppose Gardner the sole defendant, and the acts of Turton the only ground for charging Gardner. The bill might originally have been framed in this way, because Turton was a mere agent, and the plaintiff was not bound by any privity with him, except so far as by his own acts he adopted the acts of Turton. The first point is, as to the doctrine of the Court in *Crawshay v. Collins* (5), *Featherstonhaugh v. Fenwick* (6), and *Wedderburn v. Wedderburn*, which I followed in *Willett v. Blanford*. These cases establish, that where a trustee uses trust property for his own purposes, and makes profits by it, he shall account with the *cestui que trust*. If in this case Gardner had made profits, I might follow out the principle, notwithstanding the lapse of time. But no profits were made by Gardner; the case is simply one of inaction or nonfeasance in allowing a stranger to possess himself of the assets. Perhaps, originally, there might have been a case for charging him with 5l. per cent. for neglect, if the transaction were recent; but where a person in a fiduciary character makes profits, time is no bar. The case against Gardner is, that being an executor he has allowed some one to possess the assets of the testator, and improperly to deal with them. Gardner, though an executor, was not a trustee under the will, to manage the trade; and the disclaimer of Davis would not throw upon him the trust of carrying on the trade. The estate was small, and any attempt by him to come into equity, would have swallowed it up, and he might think the abandonment of the leasehold premises the best course he could take. I cannot deal with him in any other way than as executor. In this view of the case, a question arises, whether the 3 & 4 Will. 4. c. 27. s. 40. is not of itself an answer to this case. That statute appears to me to be worded in rather an unhappy manner; but in *Sheppard v. Duke*, it was held a bar in

the case of a personal legacy, and in *Prior v. Horniblow*, in the case of a residue. But if that statute does not apply, I cannot disregard the time that has elapsed. In 1816 the plaintiff came of age, and I must impute to him then a knowledge of the will. Six months after that, he applies to Gardner for an account, he is referred to Turton, who alone could render an account, and settles the account with him. In the account so settled and signed by him, the legacies are referred to as matters of discharge. That alone would be sufficient to fix him with knowledge of the will. He afterwards works on the premises as a journeyman, and is paid wages by Turton, and he continues in that state of acquiescence in what had been done for twenty-four years; and so elected to treat Gardner as a party not accountable. If the statute were no bar, I could not, after this lapse of time, consider the onus on Gardner; but the onus would be on the plaintiff, to shew why the time was not a bar. That being my view of that part of the case, the question is, how the case stands against Turton. Originally, Turton was a mere agent; he did not undertake to be a trustee, but as agent to collect the assets, and pay the debts, and administer the estate in discharging the debts of the testator. At the same time, if it appeared before me now, that that which Gardner did was necessarily a breach of trust, and Turton knew of it, he might be bound. Where a person takes possession of trust property, knowing it to be such actually, and knowing that he is assisting in a fraud, the Court in some cases would treat him as trustee; but, if a person takes trust property with the knowledge that it is such, if the trustee is not committing a breach of trust, or if the circumstances of the case are such as to justify the course, and that person himself is not concerting a breach of trust, in that case, if the transaction is recent, the party may treat him as constructive trustee. Beyond all dispute, Gardner thought that the leasehold premises were worth nothing; that the whole trade of the testator consisted of two contracts with government; that as to the good-will, the government refused to continue the contracts with the trustees. I must consider this as a case where the trustee could not ask the assistance of the Court, without ruin to the estate; and that it was not necessarily a

(5) 15 Ves. 218.

(6) 17 Ibid. 298.

breach of trust, in preferring the abandonment of the leasehold premises to the coming into a court of equity; the premises being at rack-rent, and the whole value of the good-will depending on the personal services and activity of Turton. Therefore, the question is, whether, under the circumstances, I shall consider Turton as a constructive trustee only, who might originally have been compelled to account, but cannot now. In 1817, there was a settlement, and the plaintiff, with considerable knowledge of the transaction, acquiesces for twenty-four years. Where the Court is called upon to fix a person with the character of constructive trustee, time is material. If the parties were actual trustees, the case might be different. Considering all the circumstances of the case, I cannot treat Turton otherwise than as an innocent party; and after the lapse of twenty-four years, the plaintiff having full knowledge of the facts, I cannot charge him with the profits of the trade. Turton, the only person who could give evidence of the items in the account which was settled, is dead, and though he lived nineteen years after that settlement, no attempt was made to charge him in his lifetime. No other account is asked, but the profits of the trade, and that I must refuse on the grounds stated. As to the costs, the view I take is this: if a party chooses to come into court, and fails in his litigation, he ought to pay the costs of that fruitless litigation, for he is bound to consider whether he has anything to litigate upon. Here, the plaintiff ought not to have filed his bill, unless he had a different case from what appears on the pleadings. It is admitted, however, by the answer, that half of the property was possessed by Turton, and that it was so divided between the plaintiff and Turton, upon the footing of such being Turton's right under the will. If it were not for that admission in the answer, I might have inferred that there had been some arrangement between the parties, to justify that mode of dividing the property; but as a wrong has evidently been done to the plaintiff by that mode of division, and the whole clearly belonged to the plaintiff, I think I shall exercise a sound discretion in dismissing the bill without costs.

WIGRAM, V.C. { *In the matter of the 5 Vict.*
June 30; { *c. 5. and in the matter of*
July 1. { *THE MARQUIS OF HERT-*
FORD.

Stock—5 Vict. c. 5. s. 4—Construction—Restraining Order—Distringas—Prosecution for Felony.

The 5 Vict. c. 5. s. 4. does not confer any new or summary jurisdiction on the Court.

To continue a restraining order, a bill must be filed.

On the 28th of May a restraining order was obtained under the 4th section. On a motion to dissolve, on the 30th of June, no bill being filed, and no sufficient excuse given for the omission, the Court refused to continue the order till a bill could be filed, and discharged it with costs.

Quære—Whether a party, who has obtained a distringas under the 5th section, is entitled to come afterwards for a restraining order under the 4th section.

Semble—He might, under special circumstances; ex. gr. in case of new discovery after distringas issued; or the erroneous refusal of the Bank to notice the distringas, and a strong case of merits and urgency.

Quære—Whether a party, prosecuting for felony, can institute proceedings in equity to protect the property in the meantime.

On the 2nd of June last, the present Marquis of Hertford obtained, upon an *ex parte* motion, a restraining order under the 5 Vict. c. 5, to restrain the Governor and Company of the Bank of England from transferring 4,000*l.* new 3*l.* 10*s.* per cent. bank annuities, standing in the name of N. Suisse, of Dorchester House, Park Lane, &c., till the further order of the Court. The following were the affidavits upon which the order was obtained.

The affidavit of W. H. Brabant, of the firm of Capron & Co., solicitors to the present Marquis of Hertford, stated, that the present Marquis was the sole residuary legatee under the will of the late Marquis, who died on the 1st of March 1842: that the town residence of the late Marquis was Dorchester House, &c.: that Nicholas Suisse was the valet and in the confidence of the late Marquis, and was at various time intrusted by him with monies to a large amount (the property of the late Marquis),

for the purpose of paying bills and making other disbursements on behalf of the late Marquis : that since the decease of the late Marquis, his executors having discovered, or having reason to believe or suspect, that the said N. Suisse had applied to his own use monies belonging to his master, the late Marquis, and intrusted by him to the said N. Suisse for particular purposes, "other than for the use of the said N. Suisse," and especially that the said N. Suisse had, with part of such monies so intrusted to him, purchased, in his own name, divers sums of new 3*l*. 10*s*. per cent. bank annuities, and had caused the same to be transferred into the name of him, the said N. Suisse, in the books, &c., they, the said executors, in consequence of such discovery, did, on the 4th of April last, cause the said N. Suisse to be taken into custody upon a charge of embezzling the monies of the late Marquis, and to be brought before a magistrate at Bow Street, who, upon hearing the evidence on the part of the executors, in support of the charge, did, on the 24th of May last, declare his intention to commit the said N. Suisse to prison, to take his trial at the Criminal Central Court for such embezzlement, but, on the application of counsel for N. Suisse, and with the consent of the prosecutors, the magistrate remanded him to Tothill Fields prison, in consideration of his having just recovered from a fit of illness : that there was, at the time of the said N. Suisse being so remanded, and now is, as deponent believes, the sum of 4,000*l*. new 3*l*. 10*s*. per cent. bank annuities, standing in the name of the said N. Suisse, described in the books of the Bank, as of Dorchester House, &c., and that to the belief of the deponent, a great part of such 4,000*l*. annuities was purchased by the said N. Suisse with monies belonging to, and without the direction, knowledge, consent, or privity of the late Marquis, and by N. Suisse embezzled or misappropriated : that the said executors being apprehensive that N. Suisse would sell or transfer the said 4,000*l*. 3*l*. 10*s*. per cents., did, on the 8th of April last, cause a writ of *distringas* to be issued out of this honourable Court, and to be lodged at the Bank, to restrain the sale or transfer of the said 4,000*l*., and "intended to file forthwith a bill for the same purpose," but that they had been advised, that, as the

indictment of N. Suisse for such embezzlement was at their prosecution, they could not with safety file such a bill : that on the 28th of May last, Capron & Co., on behalf of the present Marquis, did issue a writ of *distringas* to restrain any sale or transfer of the said 4,000*l*., and left the same with Freshfield & Co., solicitors to the Bank : that one of the partners of the said firm stated to the deponent, that he should advise the Bank not to refuse the transfer of the said 4,000*l*. by the said N. Suisse, notwithstanding the *distringas* of the 28th of May last had been served : that the present Marquis, as such residuary legatee, has an interest in the said 4,000*l*., as forming part of the personal estate of the late Marquis : that the present Marquis, to the belief of the deponent, and also deponent, is apprehensive that N. Suisse will forthwith sell or transfer the said 4,000*l*., whereby the same will be wholly lost to and irrecoverable by the said executors or the present Marquis, unless the Bank should be restrained by injunction from permitting the transfer thereof by N. Suisse.

Another affidavit of W. H. Brabant, filed the same day, stated, that he was present at the examination of N. Suisse, referred to in his former affidavit, and that, on such examination, it was proved, that the sum of 3,700*l*. was, in the month of February last, paid in Bank of England notes by Messrs. Coutts & Co. to the said N. Suisse, upon the cheque of the late Marquis, and that N. Suisse, shortly after the receipt thereof, paid part of the said *identical* bank notes, to the amount of 1,100*l*., into the hands of Graham, a stock-broker, who was employed by N. Suisse to invest, and who did invest the same in the purchase of part of the said 4,000*l*. 3*l*. 10*s*. per cents., standing in the name of N. Suisse; and that on such evidence, and on the evidence also of the misappropriation of other Bank of England notes received by N. Suisse for the use of the late Marquis, to the amount of 400*l*., the magistrate declared that he should commit the said N. Suisse to take his trial on such charge : that deponent has been informed and believes that there are other bank notes to the amount of 300*l*. at least, which have been received by N. Suisse from Coutts & Co. since November last, for the use of the late Marquis, which have been

also paid by N. Suisse to Graham, to be invested in the purchase of stock, and that the said last-mentioned notes were so invested in part of the said sum of 4,000*l.* 3*l.* 10*s.* per cent. annuities.

A motion was now made on behalf of Suisse to dissolve the injunction. The only affidavit, in support of the motion to dissolve, was the affidavit of N. Suisse, wherein he stated, that the whole sum of 4,000*l.* new 3*l.* 10*s.* per cents. before mentioned, was purchased by him with his own monies, and that no part of such monies in any way belonged to the late Marquis, nor was any part thereof the produce of property belonging to the late Marquis: that deponent was desirous of employing the said sum of 4,000*l.*, in his defence against the felonious charges that had been brought against him by the executors, and on which charges the trial was fixed to take place on the 6th of July next: that the late Marquis, by his will and codicils thereto, bequeathed to deponent several legacies, amounting in the whole to 19,600*l.*; some or one of which legacies are directed by the will to be paid within three months after the decease of the testator, and that deponent's solicitor had applied to the executors of the late Marquis for payment of the same, with the intention of making the same available for deponent's defence; but that the executors had refused to make such payments, and, as deponent believes, had used their best endeavours to prevent him from obtaining the pecuniary means necessary for his defence at the trial: that the costs of the defence had been very great, and had already exceeded all the means which the deponent had been able to make available for that purpose.

Mr. Sutton Sharpe and *Mr. De Gex*, for the motion.—The first ground upon which the injunction is sought to be dissolved is, that no bill has been filed to support it—*Scott v. the Bank of England* (1). The 5 Vict. c. 5. intended to give a remedy "in the place and stead" of the *distringas* issuing out of the Exchequer; and not to give a permanent right of injunction without bill filed. Secondly, a party cannot have the benefit both of the 4th and 5th sections of the act—*Ex parte Amiot* (2);

(1) 2 You. & Jer. 327.

(2) 6 Jurist, 147.

but here the executors of the late Marquis have issued a *distringas*, and then the present Marquis (substantially the same party) has obtained a restraining order under the 4th section. The two remedies are not cumulative. Thirdly, the executors are prosecuting the party for a felony in respect of this money; therefore they cannot come into equity.

Cox v. Paxton, 17 Ves. 329.

Cartwright v. Green, 8 Ibid. 405.

Gimson v. Woodfull, 2 Car. & Pay. 41.

The present Marquis, as residuary legatee, has no interest which would support a bill in equity. At all events, this injunction cannot be maintained, except as to the 1,500*l.*, which is the whole that is alleged to be traced from the late Marquis to Suisse.

Sir Charles Wetherell and *Mr. Schomberg*, contra.—As to the interest in the Marquis to sue, the words of the act are, "the party beneficially interested." Again, an order under the 4th section cannot be assimilated to the old *distringas*, which was more in the nature of a caution to the Bank, and which they might disregard; but an order under the 4th section is imperative on the Bank. The cases cited, as to the felony, were all decided upon demurrer, and they only say, that you shall not compel a man to answer so as to criminate himself. But that does not affect the question, whether the Court will interfere to save the property in the meantime; and the fact, that the executors cannot interfere without compromising the indictment, is sufficient reason for letting in the party beneficially interested in the money to apply.

[WIGRAM, V.C.—Strictly speaking, the suit of the legatee is the suit of the executors, so that it makes no difference.]

If the case is put on the merits, the plaintiff ought to have an opportunity of answering the affidavit.

Mr. Sutton Sharpe, in reply.—A legatee cannot sue in equity without shewing collusion, on the part of the executors—*Gedge v. Traill* (3), and the right is the same both in law and in equity. It cannot be argued, that the legislature meant to give relief by this summary process, where none could be

(3) 1 Russ. & Myl. 281, n.; s. c. 2 Law J. Rep. Chanc. 1.

given by bill. In *Ex parte Amiot*, the Lord Chancellor said, that wherever a *distringas* would not lie under the old practice, it would not lie under the late act.

July 1. — WIGRAM, V.C. — A question arose yesterday, as to whether I should give the Marquis of Hertford, whom I will call the party who applied for the restraining order, time to answer the affidavit filed by N. Suisse. I decided then, according to the usual course, to hear the case; and I find I can now dispose of it, just as if no affidavit had ever been filed. Confining myself, therefore, to the affidavits on which the restraining order was granted, the observation I make is this. In certain special cases, provided for by particular acts of parliament, the Court of Chancery has power finally to adjudicate upon the rights of parties, upon motion or petition, in a summary way. But, except in the cases so provided for, the Court has no power finally to adjudicate upon the rights of any one, except upon a bill filed. In this case no bill has ever been filed; and it is therefore certain, that I cannot, in this case, continue the restraining order of the 25th of May, unless the 5 Vict. c. 5. empowers me finally to adjudicate upon the rights of the parties in this case without bill, or unless the case is one in which I ought to suspend my judgment upon the motion, in order that the party, who obtained the restraining order, may have an opportunity of filing a bill.

Now, upon the first of these questions, if my individual opinion was, that the 5 Vict. c. 5. was intended to confer a new and summary jurisdiction upon this Court finally to adjudicate upon the rights of parties, I should feel the greatest difficulty in acting upon it, regard being had to the decision of the Lord Chancellor in *Ex parte Amiot*, and from what I know to be the opinion of other branches of this Court upon the same point; but my own opinion is, and always has been, that the 4th section of the act does not, upon any reasonable construction of which it is capable, confer any such new or summary jurisdiction. That clause was intended only for anterior purposes, to protect stock, until the party claiming it should have an opportunity of asserting his rights by bill in the ordinary way, an opportunity which, owing to the great facility with which

that species of property is transferred from hand to hand, was often wanting to the lawful owner of stock, and for which the common *distringas*, preserved by the 5th section, does not in all cases afford so perfect a remedy as that afforded by the 4th section. A *distringas* remains only at the discretion of the Bank. The restraining order, which the 4th section enables the Court to grant, is imperative upon the Bank; it may be made to continue during such time as the Court may direct, and can only be discharged in the meantime upon the application of parties interested. If I were literally to follow that which is reported to have fallen from the Lord Chancellor in *Amiot's case*, I should feel myself bound at once to discharge the restraining order, the subject of the present motion; for it is impossible that I can, on the evidence now before me, treat the executors of the late Marquis and the present Marquis (upon whose application the restraining order was granted) as different persons; and in *Amiot's case*, the Lord Chancellor is made to say, in effect, that the same party, who has obtained a *distringas* under the 5th section, cannot, under any circumstances, be entitled to a restraining order under the 4th section. *Amiot's case* did not require such a decision; and I do not think the Lord Chancellor intended, by what he said in that case, to decide any abstract point. I cannot but think that cases might arise in which, from the discovery after a *distringas* had issued, or because the Bank peremptorily, but erroneously, refused to notice a *distringas*, the party who obtained that writ might, upon a full disclosure of the facts, and a strong case of merits and urgency, entitle himself to a restraining order under the 4th section, notwithstanding he had sued out a writ of *distringas*, the benefit of which he could not have. I am, therefore, better satisfied to decide the case upon other grounds. I am clear that I cannot continue this restraining order without a bill being filed; and as no bill is now upon the file, the only question is, whether I should continue the restraining order till that is done, the right to do which in a proper case, I do not mean to repudiate. The Court has power to discharge or vary the order according to the justice of the case under the very words of the act; but is this a case for granting that indulgence? The

restraining order was granted on the 28th of May, after a *distringas* removed; and on the 30th of June no bill is filed, nor is any reason suggested for the omission, except the argument upon which I have already expressed an opinion, that the Court can entertain the whole case without a bill. If the bill had been filed, Suisse would now be in a position to liberate this property from restraint, if, upon the merits of the case, he could entitle himself to do so. If I were now to continue the restraining order, I should, by so doing, be imposing for a third time a restraint upon him at the suit of the same party. But this I ought not to do, when the cause of the delay arises from the laches of the adverse party. Being of this opinion, it is not strictly necessary that I should consider what the probable result of the case would have been if a bill had been filed. Upon this point I will add, only, that if I were to treat Mr. Brabant's affidavits as a bill filed, I do not see how I could, upon those affidavits only, give Lord Hertford any relief to which the executors would not have been entitled if the application had been made by them; and certainly the late case before the Lord Chancellor shews, that great difficulties would have stood in the way of the executors, if, without any other explanation than these affidavits furnish, they had sought to maintain this order. Upon the cases of *Cox v. Paxton* and *Gibson v. Woodfall*, as authorities for the broad proposition, that a court of equity can in no case afford interim protection to the property of a man who, deprived by a felony, is doing his duty to the public by prosecuting an offender, I am not called upon to give any opinion. It is satisfactory to me to recollect, that the difficulties which Lord Hertford is under in the present case, were brought to the attention of his advisers at the time the restraining order was made; and I am satisfied that those difficulties have not been removed, only because the circumstances of the case are not such as admit of their removal. I think, therefore, the restraining order must be discharged, and as the form of the proceeding was wrong, must be discharged with costs.

WIGRAM, V.C. }
July 4, 7. }

WOODYATE v. FIELD.

Creditors' Suit—Admission of Assets—Immediate Decree.

By his answer to a creditors' bill, the defendant, the administrator, admitted assets sufficient to pay all the debts of the intestate, but suggested that the promissory note, under which the plaintiff claimed, was a forgery:—Held, that the plaintiff, having proved his debt at the hearing, was entitled to an immediate decree for payment.

This was a creditors' suit. The administrator defendant admitted, by his answer, assets sufficient to pay the plaintiff's debt, and all other debts of the intestate, and merely suggested that the promissory note, upon which the plaintiff claimed, was a forgery. The plaintiff had proved his debt, and the cause being now at the hearing,—

Mr. Teed and *Mr. Bagshaw*, for the plaintiff, insisted, that he was entitled to an immediate decree for the payment of his debt—*Wall v. Bushby* (1); that the defendant, by the admission of assets, had reduced the issue simply to the propriety of the plaintiff's debt.

Mr. Girdlestone and *Mr. Alfrey*, for the defendant, insisted that, according to the practice, the defendant had a right to have the plaintiff's debt proved over again, in the Master's office. That there was no such form of decree laid down in the books.

Seton on Decrees, 52.

Gray v. Chiswell, 9 Ves. 123.

Attorney General v. Cornthwaite, 2 Cox, 45.

2 *Dan. Ch. Pr.* 854.

That when a bill was once filed, every creditor had an inchoate right in the suit.

Sterndale v. Hankinson, 1 Sim. 398.

Connop v. Hayward, 1 You. & Col. Chan. 33.

If the Court should make an immediate decree, it would be a surprise on the defendant.

Mr. Teed, in reply.—If the plaintiff asked an account of the assets, it would be a waiver of the defendant's admission.

Pemberton v. Topham, 1 Beav. 316.

Holden v. Kynaston, 2 Ibid. 204; s. c. 9 Law J. Rep. (N.S.) Chanc. 198.

(1) 1 Bro. C.C. 484.

2 T

WIGRAM, V.C. said, that the practice in a creditors' suit was an exception to the general rule; but that he could not see how the principle of the common decree in a creditors' suit applied to a case where there was a full admission of assets; that he would look through the pleadings to see if there was any case of surprise upon the defendants.

July 7.—WIGRAM, V.C.—This was a creditors' bill, filed by a simple contract creditor on behalf of himself and all other creditors, seeking the payment of a debt alleged to be secured by the promissory note of the testator. The defendant has put in his answer, in which he says, he believes the note to be a forgery, and that no debt was due to the plaintiff, but he has admitted assets sufficient to pay the plaintiff's debt, and all other debts of the testator. The answer does not suggest any ground upon which the defendant founds his opinion that the note was a forgery, or for his belief that no debt was due. The cause comes on in this state; evidence has been gone into on the part of the plaintiff to prove the debt, and the plaintiff asks an immediate decree for the payment of his debt. The defendant says, it ought to be referred to the Master to take the account, not of the estate, but of what other debts are owing from the testator. This inquiry is said to have two objects; one, that the plaintiff's debt may be proved in the Master's office; the other, that the other creditors of the testator may have an opportunity of getting their debts paid in this suit. In a creditors' bill, where there is no admission of assets, that is the usual form of the decree, and though the plaintiff may have proved his debt at the hearing, it may still be displaced by evidence in the Master's office; but the question is, whether that form of decree is applicable, where assets are admitted. The reasons for, and the principles of the decree are explained by Lord Cottenham, *Owens v. Dickenson* (2). That reasoning has no application where assets are admitted; for the executor has made all that he has liable to the payment of debts. In such a case it is impossible that the fund can be enlarged. The

object, therefore, of the special form of the decree in a creditors' suit fails. Though I had no doubt myself, I inquired of the other Judges, who also expressed themselves as having no doubt upon the subject. In effect it is proved to be so by this fact, that the creditor and the defendant executor may settle the matter, pending the suit, by paying the debt and the costs of such compromise. That has been twice decided at the Rolls, though the suit had proceeded to a considerable extent. If, then, the Court would compel a creditor to accept payment of his debt, when the executor offers to pay the debt and costs of suit, I am satisfied that there ought to be a decree for an immediate payment. But it was objected, that in *Sterndale v. Hankinson*, Sir A. Hart had said, that on the filing of a creditors' bill, every creditor has an inchoate right in the suit. The meaning of that is this, that a right then commences, provided it is afterwards perfected by decree; and so it is very accurate language to call it an inchoate right. But the question is, whether the plaintiff is not *dominus litis*; till decree he may deal with the suit as he pleases; there is nothing to prevent other creditors filing bills for the same purpose, and there is nothing more common than for several suits to exist together, and the Court permits them to go on together till a decree in one is obtained, because, by possibility, before decree any creditor may stop his suit. The only question then here is, whether the debt is sufficiently proved. It is said to be secured by a promissory note. The defendant, by his answer, admits, that he has seen the note; therefore he knows what is upon the face of it. It purports to be signed by the testator, and has two attesting witnesses. They depose that it was produced to them, written as it now appears, except the interlineation; the name of the payee was omitted, that it was inserted in their presence, and that it was then signed in their presence by the testator. I see no ground for saying, that the evidence was not sufficient. It is quite clear, that it would be sufficient at law; but it is said, the defendant might there cross-examine the attesting witnesses. I cannot intend any surprise on the defendant, as he has seen the bill. Why should the defendant not have filed a cross-bill? There is no evidence that

the note was a forgery, and no statement of the ground upon which that opinion was founded. The only point suggested at the bar was, that the practice was supposed to be different. Now, I have not at all made up my mind upon the subject, but I throw this out for the consideration of the defendant. If the defendant will undertake to pay the costs at all events, unless the Court shall otherwise direct, I will consider whether I am at liberty, at the hearing of the cause, when the case is fully proved, to entertain such an application as that now made.

L.C.
June 27; }
July 6. } JONES v. PUGH.

Solicitor and Client—Privileged Communications and Documents—Answer—Disclosure.

A, a judgment creditor of P, (who was out of the jurisdiction,) filed his bill against P, and also against R, a solicitor, seeking to redeem a mortgage of certain estates belonging to P, executed to R, and to foreclose P. P. and R. were the only parties to the mortgage security, and the bill sought a discovery from R, (who was a member of the firm of R. & Co., solicitors,) of the particulars of, and the names of the parties beneficially interested in the mortgage security; and whether any other mortgage securities had been executed by P, affecting other estates belonging to P; and the defendant R. was required to state and set forth all documents and papers in his possession, relative to the matters mentioned in the bill. R, by his answer, admitted the execution of the mortgage security to him by P, and stated that he and his partners in business had acted in the preparation thereof, as the solicitors of the parties interested therein, the particulars whereof, as well as the names of the parties beneficially interested therein, he was unable, without committing a breach of professional confidence to his clients, to disclose, and therefore ought not to disclose to the plaintiff. The defendant R. also stated, that, as the solicitor of certain other parties, he prepared several mortgage deeds affecting other property of the defendant P, and that he and his partners had in their possession the mortgage securities, and divers letters and papers

relating thereto, but which he submitted, ought not to be disclosed or produced by him, inasmuch as such mortgage deeds were also prepared, and the letters and papers came into the possession of himself and his partners in their confidential character of solicitors and professional advisers to such persons:—Held, that the objections raised by the defendant R, were valid, and that he was not bound to make the disclosure and discovery required of him by the plaintiff.

The bill was filed by Pryse Jones against William Pugh and Richard Roy, P. Jones being a judgment creditor, to a large amount, of the defendant Pugh, who was out of the jurisdiction, and Roy, a member of the firm of Roy & Co., solicitors, and a trustee under a certain indenture or mortgage security, bearing date the 29th of October 1834, to which Pugh and Roy were respectively parties, and by which indenture, certain estates, the property of Pugh, were conveyed by way of mortgage to Roy, for securing the sum of 20,000*l.* and interest thereon. The object of the bill was, to redeem the mortgage made to Roy, and it sought from the defendant Roy a discovery of the application and disposition of the proceeds arising from the sale by him of certain parts of the mortgaged estates, the names of the persons beneficially interested under the said mortgage security executed to him, and of any mortgages of other property belonging to Pugh, and whether any and what other mortgage securities had been executed, and by whom, and to whom, and when affecting the estates comprised in the said security of the 29th of October 1834; and the defendant Roy was also required to state whether he had any deeds, documents, or writings in his possession, relating to the matters mentioned in the bill.

The defendant Roy, by his answer, admitted the execution of the indenture dated the 29th of October 1834, and affecting the estates in the bill mentioned, and stated that no other estates of Pugh had at any time been conveyed to him. The defendant Roy also stated, that he and his partners in business had acted as the solicitors of certain mortgagees; and that as solicitor for certain mortgagees interested in the indentures of the month of October 1834, he was informed, and believed, that prior to and in the year

1834, the defendant Pugh was seised of and entitled to certain estates; the defendant Roy further stated, that as the solicitor of certain other persons, he prepared several mortgage deeds affecting other estates of the defendant Pugh, the nature and particulars whereof he was unable, without a breach of professional confidence to the said mortgagees, his clients, to disclose to the plaintiff, and therefore submitted that he was not bound to set them forth; that he and his partners, as such solicitors, as aforesaid, had in their possession a quantity of letters, the indenture of the 29th of October 1834, and several mortgage deeds, whereby certain other property belonging to the defendant Pugh was made a security by him, by way of mortgage to certain mortgagees, all of which belonged to and were the property of the parties named in such deeds respectively, but he was unable, without violation of the professional confidence between himself and his clients, the said mortgagees, to disclose or produce the same, and therefore he submitted that he was not bound to produce the same, or any of the particulars in relation thereto, or to the title of this defendant, as such mortgagee, as aforesaid; that he, in his professional character of solicitor, was, with his said partners, in the habit of being intrusted by different clients with monies belonging to them, for the purpose of being laid out by the defendant's firm on their behalf, but frequently in the defendant's own name, on securities producing interest, and in private trust and confidence between him and his clients, whose names he had no authority to disclose, and that the sum of 20,000*l.*, secured by the indenture of the 29th of October 1834, was thereby made payable by the defendant Pugh to the defendant Roy, and that no trust whatever was therein declared, for the benefit of any other person or persons whomsoever, and that he, the defendant Roy, was authorized, by his clients interested therein, and was entitled to receive payment to himself of the whole of the sum of 20,000*l.* and interest thereon, and thereupon and upon receipt of such costs and charges as might be properly payable, to give a good discharge for the same, and to transfer the security for the same, then vested in him under the indenture of the 29th of October 1834.

The Master having allowed five excep-

tions taken by the plaintiff to the answer of the defendant Roy, with reference to the statements made by him, as to the indentures of lease and release of October 1834, the other mortgages inquired after by the bill, and the deeds and documents and writings in his possession, relating to the matters mentioned in the bill; and the Vice Chancellor of England having overruled the defendant's exceptions taken to the Master's report, the defendant appealed from his Honour's decision.

Mr. Bethell and *Mr. Cole*, in support of the appeal.—The object of the plaintiff is to compel the defendant Roy to disclose facts and information which have come to his knowledge professionally. The Court below decided the questions, when before it, in favour of the plaintiff, on the ground, that if a defendant answered at all, he must answer fully. If that decision is to stand, the consequence will be, that the defendant Roy will be under the necessity of disclosing facts and documents which came to his knowledge and possession exclusively, in his professional character of solicitor to certain individuals, who are not parties to the suit. The present case forms an undoubted exception to the rule, that a defendant answering at all, must answer fully.

Herring v. Clobery, *ante*, p. 149.

Curzon v. De la Zouch, 1 Swanst. 185.

Rowe v. Teed, 15 Ves. 377.

The Attorney General v. Brown, 1 Swanst. 265.

Stratford v. Hogan, 2 Ball & Beat. 164.

Harvey v. Clayton, note to *Parkhurst v. Lowten*, 2 Swanst. 221.

Greenough v. Gaskell, 1 Myl. & K. 98.

Mr. G. Richards and *Mr. Wigram*, *contra*.—The plaintiff is a judgment creditor of the defendant Pugh, and has a right as such to redeem the incumbrances of the estates, and to foreclose the defendant Pugh, the mortgagor. The defendant Roy, by his answer, states himself to be in partnership with certain other persons as solicitors, who were employed by the mortgagees in the transactions referred to in the bill, and insists that he is not bound to set forth the deeds and papers inquired after by the bill; nor the communications that were made to him by the parties beneficially interested in the mortgages, because they were made to him

in his character of professional adviser to those parties; but the plaintiff simply asks Roy to set forth the names of the persons beneficially interested in the indentures mentioned in the bill, so that the plaintiff may know what persons to bring before the Court, in order to render the suit complete, and does not seek to have privileged documents or communications disclosed to him—*Parkhurst v. Lowten*.

[The LORD CHANCELLOR.—Suppose a client not wishing a sum of money to be laid out in his own name, says to his solicitor, "Invest me 10,000*l.* in your name in the funds," is not that a privileged communication?]

I would submit it is not, because the solicitor in that case is only intrusted in the same way that any other person would be. Suppose the defendant Roy had taken a mortgage in his own name, the sum advanced being the property of a client, he would be bound to disclose the name of the party on whose behalf he acted, inasmuch as it was a matter in which he did not necessarily act as an attorney or solicitor. The defendant Roy, in this case, was made a party, as any other person might have been, to the mortgage deed, as a *trustee*, and what we ask, is information as to the names of the parties for whom he acts as *trustee*.

Bramwell v. Lucas, 2 B. & C. 745; s. c. 2 Law J. Rep. K.B. 161.

Sawyer v. Birchmore, 3 Myl. & K. 572.

[The LORD CHANCELLOR.—The present is a stronger case than that of an ordinary person who is made a trustee, for the defendant in this case, as the solicitor for other parties, has no right to disclose the information sought.]

In this case, there can be no effectual decree, unless the parties beneficially interested in the mortgage securities, are before the Court—*Osbourn v. Fallows* (1); and the defendant Roy is at least bound to instruct us as to the names of the persons whose communications he claims to have considered privileged. The defendant Roy, in order to protect himself from answering, must have acquired his information, and the documents must have come into his possession exclusively in his professional capacity, and if he have acquired the information, or possessed himself of the documents in any

other character, he is bound to disclose and state the same—*Guppy v. Few* (2).

The LORD CHANCELLOR, after stating that he did not conceive that any inconvenience could arise in the present case, in redeeming the mortgage, because the defendant Roy, on receiving his principal and interest money, had authority, and was willing to convey the mortgaged premises to the plaintiff, observed that the monies advanced by the defendant Roy were monies intrusted to him to invest for his clients confidentially, and in his professional character of solicitor to them; and that on the authority of *Harvey v. Clayton*, he considered the defendant was protected from answering the parts of the bill stated in the several exceptions that had been taken.

L.C. }
July 20. } DAVENPORT v. DAVENPORT.

Pauper—Attachment—Costs.

A plaintiff, during the progress of the proceedings in a suit, and after a demurrer to his bill had been allowed with costs, obtained an order of the Court for leave to sue in formâ pauperis. Afterwards the Court made an order on the plaintiff, directing him to pay the defendants the costs of the suit incurred by them, up to the date of the order so made to sue in formâ pauperis:—Held, that it was not necessary to obtain an order to dispauper the plaintiff previously to the defendants' issuing an attachment against him for non-payment of such costs.

If the name of the party attached be correctly stated in the writ of attachment, it matters not that the name is found erroneously stated in the book kept in the registrar's office, for the entering therein of attachments.

Semble—Where the præcipe is lost, the Court will refer to the entry in writing made by the clerk in court of the party suing out an attachment in the book of attachments kept by him, for the purpose of ascertaining how the party, against whom the writ was directed to be issued, was described.

On the 9th of March 1831, the plaintiff, Edmund Davenport, filed his bill of dis-

(1) 1 Russ. & Myl. 741; s. c. 5 Law J. Rep. Chanc. 29.

(2) Hare on Disc. 168.

covery against the two daughters of William Davenport, deceased, and their respective husbands, as defendants thereto, who, on the 24th of that month, filed a demurrer and answer to the bill, and on the 17th of August 1831, the demurrer was allowed with costs. On the 9th of January 1832, the plaintiff obtained an order to prosecute his suit *in formâ pauperis*. On the 8th of February 1832, the Master issued his certificate of the costs of the demurrer, which amounted to the sum of 33*l.* 12*s.* 6*d.*, and on the 16th of February 1832, the plaintiff was directed by an order of that date, to pay the defendants their costs of the suit, up to the date of the order by the plaintiff to sue *in formâ pauperis*, the amount of which costs was certified by the Master, on the 8th of March 1832, to be 31*l.* 19*s.* 7*d.* On the 10th of December 1833, the plaintiff's appeal from the decision of the Master of the Rolls was dismissed without costs. The plaintiff was, early in December 1834, arrested upon two writs of attachment for non-payment of the two aforesaid several amounts of costs. On the 25th of June 1841, the plaintiff moved (pursuant to notice of motion) before Lord Chancellor Cottenham, that he might be discharged out of the custody of the warden of the Fleet, as to the contempts in not paying the defendants' costs in the cause. The motion was refused by his Lordship, and the irregularity now complained of by the plaintiff, was, on that occasion, raised by the plaintiff's counsel before Lord Cottenham. It appeared, that in an office copy of the entry of the attachment made in the register book of attachments, the plaintiff's christian name was written "Edward" instead of "Edmund." On issuing an attachment, the clerk in court of the party suing out the same, makes an entry of it in his book of attachments, and delivers to the clerk of the registrar a piece of paper containing the names of the parties to the suit, the cause for attachment, and a date; all which particulars are entered in the register book, by the writing clerk at the entering seat. The piece of paper in question could not be found, it not being usual to preserve such documents, but in the entry in the clerk in court's book of attachments, the name Edmund, and not Edward, was correctly inserted.

Mr. Wright and *Mr. Collyer*, in support of the plaintiff's present motion to discharge

the plaintiff out of custody, in respect of his contempts for not paying the two sums of costs, contended, first, that the defendants on account of the entry made in the register book of attachments, of the name of Edward instead of Edmund, had no right to issue attachments against the plaintiff; and secondly, that the plaintiff having been admitted by the Court to sue *in formâ pauperis*, no proceedings could be prosecuted against him, to enforce the payment of the costs in question, until he had been actually dispaupered by an order of the Court, and they cited the following authorities:—

Statutes 11 *Hen.* 7. c. 12, 23 *Hen.* 8. c. 15, and 1 *Will.* 4. c. 60.

Scandover v. Warne, 2 *Campb.* 271.

Smith v. Innes, 4 *Mau. & Selw.* 360.

Anon., 2 *Salk.* 506.

Corbett v. Corbett, 16 *Ves.* 410.

Nokes v. Watts, *Fortesc.* 319.

Oats v. Holiday, cited in *Blood v. Lee*, 3 *Wils.* 24.

Taylor v. Lowe, 2 *Stra.* 983.

Brittain v. Greenville, *Ibid.* 1121.

4 *Com. Dig.* 'Pauper,' 441.

Rice v. Brown, 1 *Bos. & Pul.* 39.

Jones v. Peers, *M'Clel. & You.* 284.

Pilcher v. Faithful, *MS. Rolls*, 8th of August 1840.

Anon. *Mos.* 68.

During the argument of the plaintiff's counsel, his Lordship directed their attention to a *MS.* case of *Higgins v. Vaughan*, dated the 1st of February 1710, before the Lord Keeper, in which the consideration as to the dispaupering the plaintiff, was reserved until after he had satisfied the costs which he had incurred, prior to his obtaining the order of the Court to sue *in formâ pauperis*, and also to another *MS.* case of *Knowles v. Hadley*, where, after answer filed, the plaintiff obtained an order to sue *in formâ pauperis*, and then moved to dismiss his bill, but the order of dismissal was made with costs.

Mr. G. Richards and *Mr. Mylne*.—The præcipe, which is the document lost, must be taken to have been correctly made out, the document before the Court being only a copy of the præcipe, in which a clerical error seems to have accidentally found its way; the attachment too is issued in a correct name, viz. that of Edmund, and this is the best evidence of the præcipe having been correctly framed. The two orders of the

Court, directing payment by the plaintiff of the two sums of costs remaining in force, the plaintiff is not in a situation to make the present application. The cases cited on the other side related only to the general costs of a suit, and not to *particular sums* of costs that had been ordered by the Court, as in this case, to be paid by the party obtaining the order to sue *in formâ pauperis*. The dictum in *Mos.* p. 68, is supported by the cases of—

Wilkinson v. Belsher, 2 Bro. C.C. 272.

Pearson v. Belsher, 3 Ibid. 87.

The LORD CHANCELLOR.—The point raised as to misnomer of the plaintiff, was clearly brought before Lord Cottenham, when sitting here, and he disposed of it, by deciding adversely to the plaintiff's application, Mr. Cooper appearing on that occasion for one of the parties, and Mr. Wigram for the other, and after a full argument of the same point before me, I see no reason whatever to induce me to differ from that decision. The clerk in court acts for the solicitor, and conducts the suit, and the label, which is the authority for the præcipe, is made in his office. The attachment issued is perfectly correct. The label or slip of paper which was handed to the registrar, must have been also correct; there is in reality a proper record and entry of whatever has been done in the matter, except that in entering the attachment in the register book of attachments, the plaintiff's name was erroneously written "Edward" instead of "Edmund." As to the other point, the plaintiff filed a bill, and an order was afterwards made by the Court, allowing a demurrer thereto, directing him to pay the costs of it. The plaintiff then proceeds with the suit, and afterwards obtains the common order to sue *in formâ pauperis*, which does not affect costs incurred previously and up to the date of that order, and for payment whereof by the plaintiff to the defendants, a distinct order was made by the Court. There is no greater hardship in the present case, than there would have been in case any other suit or action at law had existed, in which the plaintiff had been a party, and had been directed to pay the costs. There is no substantial difference between an order made for the payment by the plaintiff, of costs in the same suit, and an order made in a dis-

tinued and separate suit; and I see no reason whatever for discharging the order of the Court, by virtue of which the applicant has been attached.

WIGRAM, V.C. }
March 23; } OTTEY v. PENSAM.*
April 25. }

Practice.—Exceptions to Report.

A. B., a stranger to the cause, obtained on petition an order of reference, and the Master made his report:—Held, that the report, which required confirmation to give it effect, could not be excepted to by a petition in the nature of exceptions, unless objections had been carried into the draft report.

By an order, dated the 7th of November 1840, made upon the petition of Burton, who was not a party to the cause, it was referred to the Master to inquire, and state whether Burton had a lien upon the fund in court. The Master reported in favour of Burton's claim, who then presented a petition to confirm the report. The parties interested in the fund, presented a cross-petition in the nature of exceptions. Upon the opening of the matter, it was objected that the cross-petition was irregular, no objections having been taken to the Master's report.

Mr. Sutton Sharpe and Mr. Weld, for the petition to confirm the report, objected, that the cross-petition was irregular; that the parties ought to have taken exceptions in the usual way, this being a report which required confirmation—

2 *Dan. Ch. Pr.* 942.

Drever v. Maudesley, 7 Sim. 240; a. c.

4 *Law J. Rep. (N.S.) Chanc.* 162.

Taylor v. D'Egville, 7 Sim. 445.

Mr. O. Anderdon, for the cross-petition.—If Burton had been a party on the record, the usual mode must have been taken, of carrying in objections; but there are many exceptions to that rule—2 *Daniel, C.P.* 952, *et seq.* Here, Burton has no clerk in court, upon whom notices could be served; the Court, therefore, departs from its usual course, and allows a cross-petition in the nature of exceptions, without carrying in objections. Burton has, in fact, admitted

* Determined in Easter term.

this to be the regular practice, for he has petitioned to have the report confirmed absolutely at once, without first obtaining the order *nisi*.

Mr. Sharpe, in reply.—Objections are always required, out of consideration to the Master, that he may have an opportunity of reconsidering the part of the report complained of.

[WIGRAM, V.C. expressed himself of opinion, that objections were necessary in this case, but took time to look into the authorities.]

April 25.—WIGRAM, V.C.—Upon principle, I have no doubt as to what ought to be the practice. In the execution of the duties committed to the Master, there are some, the completion of which is wholly committed to him, so that his certificate requires no confirmation. With respect to others, his report, without subsequent confirmation, has no operation. With respect to certificates, or reports in the nature of certificates, the Master issues no warrant on preparing his report; and the only way of obtaining the opinion of the Court, in such a case, is by petition, in the nature of exceptions, praying that the certificate may be reviewed—*Russel v. Buchanan* (1). With respect to those which require confirmation, the difference in practice depends upon the nature of the proceedings. If the reference is made under a decree, or at the hearing of the cause upon further directions, the report is confirmed by order *nisi* made upon motion; but, where the order of reference is made upon motion or petition, the regular mode of confirming it is by motion or petition absolutely. In the former case, the way of obtaining the judgment of the Court, upon the report, is by filing exceptions; whereas, in the latter case, the only way of obtaining a review of it is, by a petition in the nature of exceptions. But the question of whether the report is final, or requires confirmation, depends upon the nature and subject-matter of the reference, and not upon the proceedings upon which the reference is made. So far the practice is free from difficulty. It is equally clear where a report is to be confirmed by an order *nisi*, no party can except, unless he has first carried in objections.

(1) 9 Sim. 167; s. c. 7 Law J. Rep. (N.S.) Chanc. 210.

The only question is, whether a petition in the nature of exceptions to a report, which, if made in pursuance of a decree, would require objections to be carried in, can be sustained in point of practice, unless objections have been first carried in. Upon principle, I have no doubt as to what answer is to be given to the question, unless the objections required are mere matters of useless form. But this is not the case. The objections are in the nature of a plea informing the Master of the precise point of complaint, and ensure that there shall be the same question to be tried on appeal; without this safeguard all would be uncertainty. The books of practice furnish no certain information upon the subject, except so far as relates to the common case of a reference under a decree. The authorities are equally uncertain. In *Brodie v. Barry* (2), it appears that objections were taken to the report; and I think *Taylor v. D'Egville* does not apply. I conceive it to be clear, that a person not a party to the cause, cannot except without the permission of the Court. The question here is, whether (a person not a party to the record, having obtained leave to prosecute his claim,) you can except to the report by petition, unless you have previously carried in objections to the draft report. His position is precisely the same as a party to the cause, who has obtained a similar reference. With respect to the course usually pursued, there is no uniformity. But the Court never sanctions the proposition, that the confirmation of a report can be resisted, unless the attention of the Master has been called to the point by way of objections. From the inquiries I have made, I am satisfied that my first impression was correct, that, in point of regularity, objections ought to have been taken. That would be the proper course, if Burton was a party to the cause. That circumstance makes no difference, after the Court has made an order that he should go in before the Master, as if he were a party. If the parties presenting the cross-petition desire it, I will give them leave to carry in objections, but not without a special application for that purpose, as I understand that the objections now taken were deliberately abandoned in the Master's office.

(2) 1 Jac. & Walk. 470.

K. BRUCE, V.C. } THE ATTORNEY GENERAL
May 7, 26. } v. HUGHES.

Prerogative—Legacy—Parties.

By the practice of the Court of Exchequer, the Attorney General had not the privilege of suing any one or more persons, jointly, or jointly and severally, indebted to the Crown, at his discretion.

The same rule as to parties must be applied in a creditors' suit, between the Crown and persons jointly, and jointly and severally indebted to the Crown, as between subject and subject.

In an information for the payment of legacy duty, whether all the executors living, and the representatives of such as may be dead, are necessary parties—quære.

This was a suit instituted by the Crown, for the purpose of obtaining payment of the legacy duty, payable on the legacies bequeathed by the will of a testator.

The testator died in 1818. His will was proved by his executors, Benjamin Dorington, William Hughes, sen., Abraham Dorington, and William Hughes, jun. Benjamin Dorington, William Hughes, sen., and Abraham Dorington, died before the institution of the suit. The information which was filed against Hughes, the surviving executor, and the representatives of Abraham Dorington, charged that Benjamin Dorington and Hughes the elder had not acted as executors, and sought for payment of the legacy duty, and, if necessary, for the usual accounts of the estate of the testator, and of Abraham Dorington.

It was alleged by the answer of the representatives of Abraham Dorington, that Benjamin Dorington had acted as executor.

On the cause being called on,

Mr. Loftus Lowndes and *Mr. T. Parker* took the objection, that the representatives of Benjamin Dorington had not been made parties.

Mr. Twiss and *Mr. Romilly*, for the Crown, stated, that by the practice of the Court of Exchequer, where a debt was due from a number of persons jointly, or jointly and severally, to the Crown, the Attorney General had the privilege of suing any one or more of such persons, whom he might select, at his discretion.

No authority having been produced in

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support of this position, the case stood over, that the practice might be inquired into.

On the cause coming on again, after the vacation, it was admitted, that no authority could be found as to the practice of the Exchequer on this point.

Mr. Twiss then claimed, on the part of the Crown, the privilege of suing any one or more persons in the situation of joint accountants to the Crown, on the authority of *Gill v. the Attorney General* (1). The following passage occurs in the judgment in that case: "It was held clearly, that if there are joint accountants to the Crown, each is liable for the whole, to wit, in the king's case, though not received by himself, though the law be otherwise in the case of common persons." This passage is cited by *Parker, C.J.*, in *The King v. the Inhabitants of the Artillery Ground* (2).

Mr. Dixon, for the defendant Hughes.

KNIGHT BRUCE, V.C., said, he should not apply a different rule in a case between the Crown and a subject, from that in a case between subject and subject, unless upon the clearest authority. He had heard nothing to induce him to treat this case otherwise than as between subject and subject, as to the point in question.

A considerable discussion then took place, whether, under the 36 Geo. 3. c. 52, the 32nd New Order of August 1841, and the 5 Vict. c. 5. s. 2, the representatives of Benjamin Dorington were necessary parties. His Honour said, he should decline then to decide the point, but he would hear the cause without prejudice to, and reserving, the objection. The cause was then opened, but was afterwards ordered to stand over till Michaelmas term.

L.C. }
May 25, 26, 27. } ROGERS v. GRAZEBROOK.

Bankrupt—Payment of Money into Court
—Answer—Mortgage Transaction—Usury
—Allegations in Answer.

R. H. mortgaged leasehold property to T. R., in respect of which a policy of in-

(1) Hardr. 314.

(2) Parker, 167.

insurance was effected by R. H. and T. R. in their joint names and in their characters of mortgagor and mortgagee. T. R. paid the premiums due in respect of the policy which was delivered to and retained by him. R. H. then became bankrupt, and his assignees induced the insurance company who granted the policy to pay to them the value of the property insured by the company, the same having been destroyed by fire. T. R. having filed a bill against the assignees of R. H. to have the amount received by them from the company paid in satisfaction of his mortgage security, the assignees, by their answer, questioned the validity of T. R.'s security, on the ground of all dealings and transactions connected therewith being founded in usury, and stated that T. R.'s application for leave to prove his debt, and for sale of the mortgaged premises, had been refused by the commissioner in bankruptcy, on the ground of usury:—Held, this Court not being bound by the process in bankruptcy, that the money received by the assignees must be paid into court.

On the 14th of October 1839, Reuben Hunt deposited with the plaintiff certain indentures, being the title-deeds of leasehold premises belonging to Reuben Hunt the younger, and at the same time delivered to the plaintiff a memorandum in writing, stating the indentures to have been deposited as a security for all sums due or to become due to the plaintiff on any account, and lawful interest thereon, and accompanied by an undertaking to execute on demand a legal mortgage of the leasehold premises and fixtures thereon. On the 4th of June a legal mortgage for the sum of 1,000*l.*, and lawful interest, was executed by Reuben Hunt the younger, of the leasehold premises, and the steam-engine, boiler, engines, fixtures, and effects being thereon, and on the same day Reuben Hunt and the plaintiff, as mortgagor and mortgagee, effected in their joint names an insurance against fire with the Phoenix Fire Insurance Company, on the leasehold premises, chattels, and effects, for the sum of 2,000*l.* (i. e. 250*l.* on the building, 750*l.* on the machinery, and 1,000*l.* on patterns). The patterns were not included in the mortgage to the plaintiff, but the plaintiff paid the premiums on each insurance, and the policy was delivered to and

retained by him. The leasehold premises and property thereon were shortly afterwards destroyed by fire, and, on the 20th of August 1840, a fiat in bankruptcy was issued against Reuben Hunt, under which he was found bankrupt. David Cannan was appointed official assignee, and the defendants J. W. Grazebrook and H. Drew were appointed creditors' assignees of the said Reuben Hunt's estate and effects, and they, without the consent of the plaintiff, entered into a compromise with the directors of the company, and accepted from them, with the consent of the commissioner of bankruptcy, the sum of 1,090*l.* in full discharge, in respect of the losses occasioned by the fire, and they executed a release to the company of all claims, and also an indemnity against any claims that might be made against the company by the plaintiff. The defendant Alsager succeeded Cannan as the official assignee of the bankrupt's estate and effects. The sum of 250*l.*, part of the sum of 1,090*l.*, was paid to the defendants Grazebrook and Drew, in respect of the value of the building, the sum of 360*l.* in respect of the steam engine and other machinery thereon, &c., and 500*l.*, residue of the 1,090*l.*, in respect of the patterns. The patterns were not comprised in the plaintiff's mortgage-deed. The answer of Grazebrook and Drew stated, that it appeared from the admissions of the bankrupt on his examination before the commissioner, that the plaintiff's mortgage securities were founded in usury; and they submitted that the securities were void at law, and stated, that such was the commissioner's decision on the plaintiff's applying to be allowed to prove his debt under the fiat, and for a sale of the mortgaged premises. The same answer also stated, that the defendants did not know whether the plaintiff received from the bankrupt two bills of exchange for 500*l.* and 150*l.* on the 1st of October 1839, but they believed that all the dealings and transactions between the plaintiff and the bankrupt, in respect whereof the plaintiff claimed to be a creditor of the bankrupt, and entitled to the mortgage security and policy of insurance, were after the 14th of October 1839, and after the plaintiff had the security of the said equitable mortgage and other securities, and that they consisted of advances of money on the discount of bills of exchange, upon

an agreement to be allowed by the bankrupt upon such advances interest at the rate of 6l. per cent. per annum, and that such interest was retained by the plaintiff accordingly. The answer also stated, that the defendants believed that the two bills for 500l. and 150l. did not form part of the account in respect of which the plaintiff claimed to be a creditor by mortgage of the bankrupt. The object of the bill was, to have the money received by the defendants Grazebrook and Drew applied in satisfaction of the amount due to the plaintiff on his mortgage security.

The Vice Chancellor of England, on application being made to him, by motion on the part of the plaintiff, ordered the payment into court of the sum of 1,090l. by the defendants Grazebrook and Drew.

From that order those defendants now appealed.

Mr. Teed, in support of the appeal, contended, that, as the question of usury was raised by the answer, and could not be determined till the hearing, the Court could not take away the 1,090l. from the defendants in the meantime, especially as the fact really was, that they had, pursuant to the directions of the Bankruptcy Court, paid the sum to the official assignee, which was to be applied by him according to the directions of the Court: that the answer contained no sufficient admission of the plaintiff's title to justify the Court in ordering payment by the defendants of the sum in question: that the mortgage executed in favour of the plaintiff was void, being a mortgage of lands, and founded in usury; and that, at all events, the sum of 500l. (part of the 1,090l.) having been paid by the company in respect of the patterns, which were clearly not comprised in the plaintiff's security, ought not to be ordered to be paid into court—

Richardson v. the Bank of England, 4 Myl. & Cr. 165; s. c. 8 Law J. Rep. (N.S.) Ch. 1.

Dubless v. Flint, 4 Myl. & Cr. 502.

Freeman v. Fairlie, 3 Mer. 29.

Mr. Bethell and *Mr. W. M. James* contended, that the policy, which was part of the plaintiff's security, was effected jointly by the plaintiff and the bankrupt, in their characters of mortgagee and mortgagor, and

that there being a joint interest in it, the Court would not allow one of those parties or those representing him, to take and hold possession of the proceeds of the policy against the will of the other; that the fund in question constituted a trust fund, and ought to be secured by the Court for the benefit of the party that should be eventually adjudged entitled to it; and the Court never changes a possession during litigation between the parties.

The LORD CHANCELLOR, after stating the facts as they were admitted by the answer of the defendants Grazebrook and Drew, proceeded as follows:—From the circumstances admitted in the answer, it must be fairly inferred, that the sum secured by the policy of insurance was intended, in the first instance, as a security to the mortgagee, and as a substitute of the property mortgaged to him, so that, on the happening of the fire, the amount received from the insurance company ought either to be paid to the mortgagee or into court for security. But it is then said, that the fire occurred under such circumstances as would have justified the insurance company in refusing to pay the amount of the policy of insurance, and that the company accordingly did decline to pay the money for the plaintiff's benefit, but having caused a calculation to be made of the loss actually sustained, they paid the amount of such calculated loss to the defendants, the creditors' assignees, and received an indemnity from them in respect of the plaintiff's claims. It is then argued for the defendants, that nothing was due to the plaintiff in respect of his mortgage security, inasmuch as the dealings relating thereto were founded in usury. On this point, the answer of the creditors' assignees states that the commissioner of bankrupts, sitting on the fiat, after hearing the examination of the bankrupt, refused the application of the plaintiff to be admitted to prove his debt, the commissioner being satisfied that the transactions between the plaintiff and the bankrupt were of an usurious character. But I am not concluded by the proceedings that have been had under the fiat in bankruptcy; neither can I, on the statements contained in the answer, come to the same conclusion as the commissioner of bankrupts arrived at. The answer does not deny the

existence, on the 1st of October 1839, of the two bills of exchange for 500*l.* and 150*l.*, upon which the bankrupt became indebted to the plaintiff. Subsequently, on the 14th of October 1839, the mortgage by deposit of title-deeds occurred; and if it be true (as is alleged by the plaintiff) that the mortgage was substituted as a security, in lieu of those bills, then the transaction between the plaintiff and the bankrupt was not illegal. The defendants then say, they believe that those bills were paid or renewed, and formed no part of the foundation of the dealings between the plaintiff and the bankrupt; but on their belief I cannot take on myself to act. I do not think the qualifications contained in the answer ought to vary my opinion; they constitute the real question in the cause, which must be determined at the hearing. In the meanwhile, the money must be secured by being brought into court. Thus far I agree with the decision of the Vice Chancellor, but there is one point on which I must differ from his Honour. The insurance is expressly stated to be for securing 250*l.* on the leasehold buildings, 750*l.* on the machinery, steam-engine, boiler, &c., and 1,000*l.* on the patterns; and in the answer it is positively stated, that the patterns were distinct from and formed no part of the mortgage security. On the application to the insurance company for payment of the amount insured, they made the following payments, viz., 250*l.* in respect of the buildings, 360*l.* in respect of the steam-engine and other machinery, and 500*l.* in respect of the patterns. Thus the sum of 590*l.* only is admitted to have been received by the defendants in respect of the property actually mortgaged to the plaintiff; the plaintiff therefore having no interest in the sum of 500*l.*, residue of the said sum of 1,090*l.*, I cannot order the defendants to pay that into court. The order made must therefore be varied accordingly.

2,500*l.* to trustees, to pay the same amongst his children, and the children of such of them as should be dead at the decease of his wife, in such shares as she should appoint; and as to such parts thereof to which the appointment of his wife should not extend, upon trust to pay the same to A, B, and C, at the end of twelve calendar months after the death of his wife, with interest for the same from his wife's death. The testator's wife, by her will, appointed various sums amongst several of the testator's children, amounting altogether to the sum of 2,300*l.*, to be paid at the decease of her son William, except the sum of 670*l.* part thereof, which she appointed to her son William, and which was to be paid to him on her decease:—Held, that the intermediate interest which accrued on the several sums amounting to the sum of 2,300*l.*, except the sum of 670*l.* part thereof, appointed to William, went to the parties entitled under the will of the testator, in default of appointment, viz. A, B, and C.

John Henderson, who died in 1807, by his will, gave an annuity to his wife for her life, and on her decease, he gave the sum of 2,500*l.* to trustees, to pay the same to and amongst his children, and to the children of such of them as should be then dead, in such shares and proportions, and at such time and times as his wife should, by her last will and testament appoint, and for want of such appointment, or as to such parts thereof, whereof no such appointment should be made, upon trust to pay the same equally amongst the said testator's five sons, Joseph, Richard, James, William, and Robert Henderson, and his daughter Isabella, the wife of Sampson Barber, or to the survivors, or to the children of such of them as should be then dead, leaving issue, such issue being entitled to their parent's share, and to be paid at the end of twelve calendar months after the decease of his wife, with interest for the same, from the time of his wife's decease.

The testator's widow died in October 1834, having previously made her will, by which, after reciting the power of appointment given to her by the will of her late husband, she appointed the sum of 2,500*l.* in manner following, that is to say, "I give to my son James Henderson the sum of 700*l.*, to my son Robert Henderson the

M. R. }
June 3. } HENDERSON v. CONSTABLE.

Legacy—Construction—Interest—Appointment.

J. H. by his will, gave an annuity to his wife, and on her decease, gave the sum of

sum of 700*l.*, to my grandchildren John Henderson 100*l.*, to William Henderson the sum of 50*l.*, to Isabella Henderson the sum of 20*l.*, to Sarah Henderson 20*l.*, to Eleanor Henderson 20*l.*, and Jane Henderson 20*l.*, the sons and daughters of my deceased son John Henderson; to my son William Henderson 670*l.*; the said legacies or sums to be paid at the decease of my son William, except the one left to himself, to be payable at my decease; and, if any of my said children or grand-children should happen to die in my lifetime, leaving child or children, I give the legacy or share of him or them so dying, unto his, her, or their child or children, in equal shares."

All the children of the testator, named in his will, to whom the sum of 2,500*l.* was given in default of appointment, were living at the testator's decease; but Joseph Henderson, the son, died in 1822, unmarried and without issue, and his daughter Isabella died in May 1834, leaving eight children. John Henderson, another son of the testator, who was living at his death, but died afterwards, and in the lifetime of the testator's widow, left six children surviving him.

The sole question for the consideration of the Court was, who took the amount of interest that accrued on the sum of 1,630*l.*, (the aggregate of the appointed sums of 700*l.*, 100*l.*, 50*l.*, 20*l.*, 20*l.*, and 20*l.*.) between the date of the widow's decease and the death of William Henderson.

Mr. Kindersley and *Mr. Elderton*, for the plaintiff James Henderson, one of the testator's sons, contended, that it became divisible, as unappointed, amongst the children of the testator named in his will, who survived the widow and the children of the testator's deceased daughter, the children of the daughter taking only the deceased parent's share; and that there could be no implication of a gift in the case of a power where there was a disposition made of the fund in default of appointment.

Mr. C. C. Barber, for the children of the testator's daughter, cited 1 *Sugden on Powers*, 575, and contended, that a mere power of distribution was given to the testator's widow, that she might have appointed the interest that accrued due on the sums forming the aggregate sum of 1,630*l.* between the time of her decease and the death of William Henderson, had she chosen to do so; and

that the omission on her part to appoint the same, was equivalent to an appointment thereof in favour of those parties who were entitled under the testator's will in default of appointment.

Mr. Faber, for the children of John Henderson, deceased, to whom various sums were appointed by the will of the wife, contended, that the *interest* that accrued on the several sums forming the aggregate sum of 1,630*l.*, went to the parties entitled to those sums respectively, as an accessory thereto.

Mr. Phillips, for the assignees of John Henderson, out of whose real estate the sum of 2,500*l.* had been raised, contended, that the gift in default of appointment was not tantamount to a residuary gift; that the case of *Wilson v. Piggott* (1) had no application; that there was no gift by implication in favour of William Henderson; and that they were entitled, as representing John Henderson, to the amount of the interest in question.

Mr. Wray, for William Henderson, contended, that he took the interest by implication, and cited *Roe d. Bendall v. Somerset* (2).

The MASTER OF THE ROLLS said, the real question was, whether the interest of the sum of 1,630*l.*, part of the sum of 2,500*l.*, was not part of that which was the subject of appointment; that he could scarcely think it possible that the subject-matter of appointment was intended to differ from that which was given over by the testator, in default of appointment.—[Here his Lordship read the words of the testator's will, by which the sum of 2,500*l.* was given over in default of appointment, *with interest* from the time of his wife's decease.] That the wife clearly intended to dispose, by her will, of the whole sum of 2,500*l.*, but, in fact, did not do so, she having only disposed of 2,300*l.*, part of the principal sum of 2,500*l.*, and given a specific direction that 630*l.*, part thereof, should be paid directly, and that the residue of the sum of 2,300*l.* should be paid at the decease of William Henderson; that the parties taking under appointment, except William Henderson, could only take the sums actually appointed without interest,

(1) 1 *Sugd. on Pow.* 575.

(2) 5 *Burr.* 2608; s. c. 2 *W. Black.* 692.

and that the interest being, in his opinion, part of the subject-matter of appointment, and not being appointed by the widow, must go over to the parties entitled, as in default of appointment.

M. R. }
June 24. } GAREY v. WHITTINGHAM.

Will—Construction—Expectant Interest—Costs—Husband and Wife.

A, by will, gave the interest of his residuary estate to his wife, for life, with directions, on her death, to the trustees of his will, to divide the corpus into three equal parts, and to pay the same as follows, viz. one-third part thereof to the child or children of his brother Thomas, who should be living at the decease of his wife; one other third part to F. G, the daughter of the testator's brother Aaron, absolutely; and the remaining one-third part to Thomas B. and S. B, the son and daughter of the testator's brother John, absolutely. The testator then expressed himself as follows:—"And in case such any or either of them should die, having left a child or children surviving, then the expectant's share shall go to and be equally divided between his or her child or children in equal shares and proportions, if more than one, and if but one child living, then the whole to that one, and in failure of issue, then to be divided between the survivor or survivors of his said nephews and nieces, as aforesaid, in equal shares and proportions."

All the children of Thomas Baker, the testator's brother, died in the lifetime of the testator's widow, but some of them left issue, who were living at her death:—Held, that the one-third part of the residue first given by the will, did not lapse, but that the children of the children of the testator's brother Thomas Baker took the same.

Two of the defendants, husband and wife, living apart, and putting in separate answers, only allowed one set of costs.

William Baker, by his will, dated the 3rd of April 1813, gave the residue of his real and personal estates to trustees, in trust for his wife Elizabeth Baker, for life, and after her decease, to sell the same, and divide the proceeds into three equal shares or proportions between and amongst the three several

parties thereafter mentioned, that is to say, one-third part or share thereof unto the child or children of his brother Thomas Baker, who should be living at the time of the decease of his wife, in equal shares and proportions; and if but one child living, then the whole to that one, to and for his, her, and their own absolute use and disposal. The testator then gave another third part or share thereof unto Fanny Garey, widow, therein described as Frances Garey, the daughter of his brother Aaron Baker, to and for her absolute use and disposal; and he gave and bequeathed the remaining third part or share thereof to Thomas Baker and Sarah Baker, (the petitioner in the present case,) therein respectively described as the son and daughter of his brother John Baker, in equal shares and proportions, to and for his, her, and their own absolute use and disposal, and in case such any or either of them should die, having left a child or children surviving them, he declared that the expectant's share should go to and be equally divided between and amongst his or her child or children, in equal shares and proportions, if more than one, and if but one child living, then the whole to that one; and in failure of issue, then to be divided between and amongst the survivor or survivors of his said nephews and nieces, as aforesaid, in equal shares and proportions, to and for his, her, and their own absolute use and disposal.

The testator died in 1814, and his widow on the 17th of October 1840.

The testator's brother Thomas had no child living at the death of the widow, but he had had several children, three only of whom had left any children surviving them, viz. Anne Barton, Mary Batty, and Samuel Aaron Baker. Fanny Garey, Thomas Baker, the testator's nephew, Anne Barton, Mary Batty, S. A. Baker, and Sarah Baker, and the testator's widow, were found by the Master to be the testator's next-of-kin at his decease.

Fanny Garey and Thomas Baker, the nephew of the testator, had died, leaving children surviving them.

The question for the decision of the Court was, whether inasmuch as all the children of the testator's brother Thomas pre-deceased the testator's widow, the one-third share of the residue bequeathed to them, lapsed in

favour of the testator's next-of-kin, or whether it was given to the issue of those children, by the concluding part of the will.

Mr. Kindersley, Mr. Spurrier, Mr. Webster, and Mr. Greene, for the petitioner Sarah Baker, and others, the next-of-kin of the testator, contended, that the expressions, "expectant's share," and "such any or either of them," had reference to the several shares of the residue given by the testator to Fanny Garey and to Thomas and Sarah Baker, and that it was not correct or common, when speaking of a contingent interest, to call it an expectancy.

Tawney v. Ward, 1 Beav. 563; s. c. 8

Law J. Rep. (N.S.) Chanc. 319.

Christopherson v. Naylor, 1 Mer. 320.

Ward v. Ward, 3 Mer. 706.

Mr. Addis, for the living children of Thomas Baker's deceased children, contended, that the words "such any or either of them," must have reference to the share of the residue bequeathed to the children of the testator's brother Thomas; that the words "expectant's share," could only refer to the issue of any deceased children of the testator's brother Thomas; and, that all that was requisite to render the matter clear and definite in favour of the children of Thomas Baker's deceased children, was the addition of a few words, which had been inadvertently omitted by the testator.

Mr. James Campbell and Mr. Sheffield, for the children and personal representatives of the deceased children of Fanny Garey and Thomas Baker, the nephew of the testator, contended, that by the expression "survivor or survivors of his said nephews and nieces," the testator intended the children of all his brother's children, and the issue of such of them as were dead, to take, and not to restrict the gift to the children of his brother Thomas's children only—*Giles v. Giles* (1).

The MASTER OF THE ROLLS, after stating the testator's will, proceeded as follows:—We can only endeavour, in a case like the present, to arrive at a rational conclusion as to the testator's meaning, and I think the persons whom the testator must have had in

contemplation to take under the bequest of the first one-third part of his residuary estate at the death of the testator's widow, were his nephews and nieces, who were *expectant* to receive benefits designed for them at the death of the testator's widow. But it is said in argument, that the persons expectant, were only those who should survive the testator's widow, and could not be any other persons, because there could exist no expectation in those who had merely contingent interests. Is it, however, a necessary construction, that none shall take save those who actually receive a vested interest during the lifetime of the testator's widow? The children of the testator's brothers Aaron and John Baker took vested interests in their respective third parts of the residue, but they were nevertheless expectants in so far as they were not entitled to receive their respective shares until the widow's death. The others did not take vested interests, because it was contingent on their surviving the widow, whether they took an interest or not, but still they must be considered as persons having expectant interests. As regards the words "such any or either of them," there seems to have been an accidental omission by the testator of a few words immediately after the word "such." By the word "them," the testator must have meant those having expectant interests, that term embracing those persons taking contingent interests. Then the testator speaks of the "survivor or survivors of his nephews and nieces," and I cannot conceive that by that expression he intended only such nephews and nieces as took vested interests. The case is one of an exceedingly unsatisfactory nature; but I think, if words can be reasonably supplied in giving effect to the testator's will, I must pursue that course. The testator must have accidentally left out immediately after the word "such," some such words as these, viz. "the child and children of his said brothers."

In this case, two of the defendants, husband and wife, living apart from each other, and who had answered separately, were allowed one set of costs only.

The like order was made as to a bankrupt defendant and his assignees.

(1) 8 Sim. 360; s. c. 6 Law J. Rep. (N.S.) Chanc. 176.

L. C. }
May 27, 28. } TAYLOR v. JARDINE.

Practice.—Form of Decree on Dismissal of Bill with Costs—Orders of 10th of May 1839.

The bill had been ordered at the hearing to be dismissed with costs, and the usual order had been drawn up, directing that the plaintiff's bill do stand dismissed out of court with costs, to be taxed by the Master. On the defendant's making application for a writ under the Orders of the 10th of May 1839, to enforce payment of these costs, a difficulty was suggested at the registrar's office, in issuing the same, inasmuch as in the order of the court, as it had been drawn up, there was contained no direction for payment of costs by the plaintiff to the defendant.

Mr. Sutton Sharpe applied, that the order, as drawn up, might be so altered, as to direct in terms the payment of the costs by the plaintiff to the defendant.

Mr. W. T. S. Daniel, for the plaintiff.

The LORD CHANCELLOR was of opinion, that the common form of order was a constructive order for payment of the costs by the plaintiff to the defendant, and that there could be no doubt that the Orders of the 10th of May 1839, were intended to apply to a case like the one before the Court. His Lordship accordingly directed the order as drawn up, to be so altered, as to make it a positive order for the payment of the costs by the plaintiff to the defendant.

The words, "and paid by the plaintiff," were afterwards added at the end of the order, as the same was drawn up previously to the application being made.

M. R. }
June 2, 10. } NASH v. MORLEY.

Legacy—Charitable Gift, Validity of.

A, by will, gave directions for the conversion of his residuary personal estate, and investment thereof, and that his executors should receive the interest half-yearly, and divide it amongst poor pious persons, male or female, old or infirm, in 10l. or 15l., as they should see fit, not omitting large and sick

families of good character :—Held, that the same was a valid charitable bequest, and would be carried into execution by the decree of the Court, and that one of the three executors was, considering the particular circumstances of the case, justified in instituting a suit for a scheme to effectuate the testator's charitable intention, without previously making application to the Attorney General for his approval of the suit.

John Wilkinson, by his will, dated the 20th of April 1831, after bequeathing an annuity of 300l. to his widow, and legacies to his daughter Jane and other persons, proceeded as follows :—" Finally, after my just debts and legacies are paid, my will and pleasure is, that all my money in banker's hands, bills of exchange, &c., be collected into cash, and laid out in the funds in the Bank of England, where I now have considerable property; and that my executors hereafter named, their heirs and assigns, do receive the interest thereof at the Bank, half-yearly, and divide it among poor pious persons, male or female, old or infirm, into 10l. or 15l., as they see fit, not omitting large and sick families of good character; and for the fulfilment of this my last will, I appoint William Nash, John Morley, and my son Jacob Wilkinson, my executors." The testator, by a codicil, dated the 29th of July 1833, bequeathed legacies of considerable amount to his son and daughter, and thereby confirmed his will in all other respects.

The testator died on the 6th of August 1833, and on the 22nd of that month, the three executors proved the testator's will and codicil. The testator's widow and his son and daughter, having survived him, they, in September 1833, executed deeds, whereby they assented to and confirmed the will and codicil in every respect, and particularly the charitable bequest and directions contained in the will, and duly released the executors from all liabilities, claims, and demands arising out of the said will and codicil, or either of them, or in respect of the testator's estate and effects, except the annuity and legacies bequeathed to his widow and son and daughter, by the will and codicil respectively.

The legacies given to the testator's son and daughter, were duly paid by the executors, previously to the execution of the last-

mentioned deeds; and the testator's widow received her annuity of £300^{l.}, up to the time of her death in September 1838, and Jacob Wilkinson became her legal personal representative. In December 1833, the testator's daughter became the wife of Thomas Nash, and after the date of the said deeds of confirmation, the three executors invested the whole of the residue of the testator's personal estate in the purchase of 3^{l.} per cent. consolidated bank annuities, in their joint names, pursuant to the directions contained in the will, in order that the same might be applied by them, according to the charitable bequest contained therein. The executors, from time to time, divided the dividends and interest arising from the trust funds, up to the 6th of July 1840, amongst such poor pious persons, male or female, old or infirm, in sums of 10^{l.} or 15^{l.}, as they considered to be fit and proper objects of such charity, not omitting large and sick families of good character, according to the directions in that behalf contained in the will. The bill, which was filed by William Nash, against John Morley, Jacob Wilkinson, Thomas Nash, and Jane his wife, and Her Majesty's Attorney General, after stating the above facts and circumstances, alleged that the plaintiff was desirous of continuing to apply the dividends of the trust funds, for the aforesaid charitable purposes, according to the directions of the will; but that Jacob Wilkinson, as one of the children and next-of-kin of the testator, and as the legal personal representative of Mary Wilkinson, deceased, and Thomas Nash and Jane his wife, in right of Jane Nash, as the other of the children and next-of-kin of the testator, insisted that the bequest of the residue of the testator's money in his banker's hands, bills of exchange, &c., was not a valid bequest for charitable purposes; and that the next-of-kin of the testator, living at his death, were entitled to the whole of such residue; and the bill prayed accordingly, that the trusts of the will and codicil, so far as they remained unexecuted, might be carried into effect; and that the rights and interests of all parties in the trust funds, which had arisen from the investment of the residuary personal estate, and of the dividends remaining unapplied, might be declared, and proper directions given for applying the same, and, if necessary, that some proper

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scheme might be settled and approved of by the Court, for the future application of the dividends and interest of the said trust funds, according to the charitable intentions of the testator, declared in his will.

Three questions were discussed in the course of the arguments:—First, whether the charitable gift, contained in the will, was a good and valid charitable gift, and such as the Court could decree the execution of. Secondly, what effect the deeds of confirmation could have on the gift; and thirdly, whether the plaintiff was regular in instituting the suit, without having previously obtained the sanction of Her Majesty's Attorney General.

Mr. G. Turner and *Mr. Gaselee*, for the plaintiff.

Mr. Pemberton and *Mr. J. Humphrey*, for the defendants Thomas Nash and Jane his wife, cited—

Williams v. Kershaw, 5 Law J. Rep. (n.s.) Chanc. 84.

Ommanney v. Butcher, Turn. & Russ. 260.

Waldo v. Caley, 16 Ves. 206.

Horde v. Lord Suffolk, 2 Myl. & K. 59.

Ellis v. Selby, 1 Myl. & Cr. 286; s. c. 5 Law J. Rep. (n.s.) Chanc. 214.

Mr. Kindersley, for the defendant Jacob Wilkinson.

Mr. Tinney and *Mr. Dixon*, for the defendant John Morley.

Mr. Wray, for the Attorney General, submitted, that the gift amounted to a public charity, and was valid, and ought to be executed by the Court; and insisted that the plaintiff, a trustee, had no right to file a bill in a case like the present, but that the matter ought to have been brought before the Court by information by the Attorney General; and that such an information might still be filed, notwithstanding the present suit, by that officer.

The following authorities were also cited in the course of the argument.

James v. Allen, 3 Mer. 17.

In re Franklin, 3 You. & Jer. 544.

In re Wilkinson, 1 Cr. M. & R. 142; s. c. 3 Law J. Rep. (n.s.) Exch. 236.

Act of Parliament, 43 Eliz. c. 4.

The MASTER OF THE ROLLS, after stating the testator's will and codicil, and the deeds of confirmation executed by the testator's

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widow and next-of-kin, pronounced judgment to the following effect:—After the execution of the deeds, the funds were invested, and the income was applied for a short time by the trustees, in accordance with the trusts of the will. Afterwards, the next-of-kin raised the question, whether the bequest for charitable purposes was valid. The plaintiff, one of the trustees, being desirous of applying the dividends of the trust funds as directed by the will, but being unable to do so, by reason of another of the trustees, who was one of the next-of-kin, declining to join him therein, filed the present bill, seeking the decree of the Court. The question was, whether a gift "to poor pious persons, male or female, old or infirm, as the trustees may see fit, not omitting large and sick families of good character," is a valid charitable gift; and I think that, if the Court had not the power to compel the trustees to apply the fund for charitable purposes, the trust could not be maintained. The question in these cases always is, whether the Court can apply the fund to charitable purposes, without any option in the trustees. If there were an option, and not a duty in the trustees, to apply the fund to private charitable purposes, the trust could not be executed here; but the testator had, in this case, shewn his intention that the executors should not take the fund beneficially. It was contended, that the testator, by the gift in question, had in his contemplation, at the time he made his will, private charity, and not public charity; and that the trustees were to exercise their discretion in the distribution of the dividends of the trust fund, and therefore the Court had no jurisdiction, and the next-of-kin must take. The difficulty arose from the ambiguity of the words used. In *The Attorney General v. Pearce* (1), Lord Hardwicke said, it was "almost impossible to say what charities were public and what were private in their nature," and no one had ever attempted, by any definition, to state what was a private and what a public charity. A gift for poor persons, without more, had been held to be a good charitable gift; and it was not less a charitable gift, because the objects were to be pious, old, or infirm, as well as poor. Here, undoubtedly, no particular persons were

specified, and Lord Hardwicke, in the case already referred to, says, "Where testators have not any particular person in their contemplation, but leave it to the discretion of a trustee, to choose out the objects, though such person is private, and each particular object may be said to be private, yet, in the extensiveness of the benefit accruing from them, they may very properly be called public charities." A sum to be disposed of by A. B. and his executors, at their discretion, amongst poor housekeepers, was of this kind. It was argued, that the word "poor" did not extend through the whole gift, but his Lordship thought it clear that the word "poor" covered the whole bequest, and that it was a valid bequest, and ought to be carried into execution. It was objected, that a trustee had no right to maintain a bill like the present one, but his Lordship thought otherwise. The trustee alleges, that he was desirous of carrying the trusts of the will into execution, but that he could not do so, through the conduct of the other trustee. It would have been better if he had applied to the Attorney General; but at the same time he could not say the trustee ought to be dependent on the Attorney General, who might have refused his sanction, and his Lordship could not pronounce that the suit was improperly instituted. His Lordship directed a reference to the Master to approve of a scheme, and observed, that it would be more satisfactory if the Attorney General would join in settling it. The plaintiff and the defendant Morley and the Attorney General, were directed to have their costs out of the fund; but the next-of-kin, having confirmed the testator's will, were not allowed their costs.

M.R. }
Feb. 19, 26. } DAVIES v. FISHER.

Legacy—Construction.

A. by her will gave all her residuary estate unto B. for life, and from and after the decease of B. in trust for his children, as they severally attained the age of twenty-five years, equally to be divided between them, if more than one; and if but one, the whole to such one child, the income to be applied during their respective minorities by the

(1) 2 Atk. 87.

guardians, for the time being, of the said children or child, for their respective support, maintenance, and education; and in case no child of the said B. should live to attain the age of twenty-five years, then over:—Held, in a suit instituted by the children of B, that the bequest to them of the residue is a valid bequest.

James Davies by his will of the 16th of September 1824, after giving divers specific and pecuniary legacies, gave, devised, and bequeathed all the rest and remainder of his property, as well real as personal, unto his wife Ann Davies, absolutely; and he appointed his said wife and William Powell to be the executors of his will. And by a codicil thereto, after stating that by his will he had directed his wife to be his residuary legatee, the testator thereby provided, that in case the said Ann Davies should die without making a will, after her decease the remainder of all his property, whatever it might consist in, should be equally divided among his brother's (William Davies's) four children; namely, William Davies, James Davies, junior, Martha Ann West, and Mary Davies, or to as many of the aforesaid children as might be living at the decease of the said Ann Davies; and he likewise appointed the said William Davies, junior, his residuary legatee instead of his said wife Ann Davies. The testator died in December 1824, leaving his wife surviving, who, by her will of the 4th of April 1831, after reciting that her late husband, James Davies, by his will and codicil thereto, appointed her his residuary legatee, and directed that, in case of her death without making a will, after her decease his nephew, William Davies, junior, should be his residuary legatee, did, in pursuance of the authority reserved to her by the said will and codicil, for the purpose of disposing of all the estate of her late husband over which she had any authority, and also, of her own estate and effects of what nature or kind soever, make her will and testament in manner following; that is to say,—First, she appointed James Fisher and William Powell executors of her will, and, subject to her debts and certain specific and pecuniary legacies and annuities therein mentioned, as to all the rest, residue, and remainder of her personal estate, chattels, and effects, whatsoever and wheresoever, she

gave and bequeathed the same and every part thereof unto the said James Fisher and William Powell, their executors and administrators, upon trust, to convert the same into money, and to stand and be possessed thereof, upon and for the trusts, intents, and purposes thereafter expressed and declared of and concerning the same; that is to say, upon trust, that they, the said James Fisher and William Powell, and the survivor of them, did and should, during the life of William Davies the younger, pay the interest, dividends, and annual produce thereof, as the same should come in and be received, unto the said William Davies the younger, and his assigns, for his and their absolute use and benefit; and from and after the decease of the said William Davies the younger, in trust for the children of the said William Davies the younger, as they severally attained the age of twenty-five years, equally to be divided between them, if more than one, and if but one, the whole to such one child; the income to be applied during their respective minorities by the guardians, for the time being, of the said children or child, for their respective support, maintenance, and education; and in case no child of the said William Davies should live to attain the age of twenty-five years, then in trust for the children of James Davies, as they severally attained the age of twenty-five years, equally to be divided between them, if more than one; and if but one, the whole to such one child, the income to accumulate in the intermediate time, and be paid with the principal; and in case no child of the said James Davies should live to attain the age of twenty-five years, then in trust for the children of Martha Ann West, when and as they should live to attain the age of twenty-five years, equally to be divided between them, if more than one; and if but one, the whole to such one child, the income to accumulate in the intermediate time, and be paid with the principal. And in case no child of the said Martha Ann West should live to attain the age of twenty-five years, then she gave and bequeathed the same in manner therein mentioned. The testatrix died in June 1832, leaving William Davies the younger her surviving, who thereupon received the income of the residuary estate of the testatrix, including what she derived from her husband, the testator, James Davies,

up to the time of his death in January 1834. This suit was instituted by the children of William Davies the younger, for the purpose of having the trusts of the will of Ann Davies carried into execution; and the cause coming on to be heard on further directions, the principal questions were, what property passed under the will of Ann Davies, and what were the rights and interests of the plaintiffs therein.

Mr. Pemberton and *Mr. Keene*, for the plaintiffs.

Mr. Chandless and *Mr. Hoare*, for the trustees of the will of Ann Davies, contended, on the authority of—

Bull v. Kingston, 1 Mer. 315,

Hales v. Margerum, 3 Ves. 299,

that Ann Davies took an absolute interest in the residuary property of the testator James Davies, and not a life estate, with a power of disposition merely.

Mr. Tinney, *Mr. Wood*, and *Mr. Bacon*, for Mr. and Mrs. West and their children, cited *Leake v. Robinson* (1), and argued that the cases of *Bull v. Kingston* and *Hales v. Margerum* had no application, because in those cases the objects of the testator's bounty were married women, and the testator intended to confer upon them that power of disposition which they had not in law.

Mr. Russell, for the executors of James Davies the younger, and the children of James Davies.—By his will and codicil, James Davies has given to the wife his residuary property for her life, with a power of disposing of the same only, and not an interest; and the power not having been well executed, it did not pass under her will. The power is not well executed, because the testatrix has not pointed by her will to the particular fund, but has referred generally to the property in which she had an interest, and that in which she had not. The words she has employed are applicable to her own property only, those words being "all the rest, &c. of her personal estate," &c.

Lewis v. Lewellyn, Turn. & Russ. 104.

Napier v. Napier, 1 Sim. 28; s. c. 5

Law J. Rep. Chanc. 65.

Jones v. Tucker, 2 Mer. 533.

Roach v. Haynes, 6 Ves. 153; and upon appeal, 8 Ves. 584.

Bradly v. Westcott, 13 Ves. 452.

(1) 2 Mer. 363.

And the will of Ann Davies not being an execution of the power, the residue passed by the will of the testator James Davies—*Vandiest v. Fynmore* (2).

Mr. Kindersley and *Mr. G. Turner*, for the next-of-kin of Ann Davies.—The first inquiry is, as to the effect of the will and codicil of James Davies; and secondly, as to the effect of the will of Ann Davies. And first, the testator having given his residuary property to his wife absolutely, has, by his codicil, provided, that in case she should die without making a will, after her decease, it should be divided amongst the persons named in the codicil. This provision does not import a power or a cutting down of the absolute interest given to the wife; and the other parties have assumed without proof, that the testator by his codicil indicated an intention to limit or contract the estate of his wife. The power of disposition by will is involved in an absolute gift, and this provision does not create a power as distinguished from an interest, but refers only to that which is incidental to an interest. The proviso does not vary the gift to the wife, any more than if the testator had said, "I give her the power of disposing by will." You have no more right to assume that the absolute interest of the wife is cut down to a life interest in the former case, than that a benefit is super-added in the latter case, which is contrary to all the decisions on the point—*Bradly v. Westcott*.

Standen v. Standen, 2 Ves. jun. 589.

1 *Roper on Legacies*, p. 509.

Taking it for granted, that the words, "in case she should die without making a will," do not seek to create a power; in the next place, assume that they create a contingency, that in case the wife should die without having made a will, then the estate should go over. The contingency has not happened, because the wife has left an ecclesiastical will at her death, and her absolute residuary gift still remains.

Harrison v. Foreman, 5 Ves. 207.

Sturgess v. Pearson, 4 Madd. 411.

Again, if the testator meant to say by his codicil, "In case you do not make a will, the residue shall go over," such an attempt to guide the devolution of the property is void

(2) 6 Sim. 570.

—*Ross v. Ross* (3). In the second place, Mrs. Davies, by her will, passed the residue as well as her own property—*Goodere v. Lloyd* (4)—to her executors, and her next-of-kin are entitled to it. No appropriation was directed by Mrs. Davies of the income of the residue after the death of William Davies the younger, and between the times of his children attaining their ages of twenty-one years and twenty-five years, and the gift to them is too remote. As to the operation of Mrs. Davies's will, the following cases were cited—

Murray v. Addenbrook, 4 Russ. 407 ;

s. c. 8 Law J. Rep. Chanc. 79.

Mills v. Roberts, 1 Russ. & Myl. 555 ;

s. c. 8 Law J. Rep. Chanc. 141.

Jones v. Mackilwain, 1 Russ. 221.

Vivian v. Mills, 1 Beav. 315 ; s. c. 8 Law J. Rep. (N.S.) Chanc. 239.

Ring v. Hardwick, 2 Beav. 352.

Fonereau v. Fonereau, 3 Atk. 645.

Palmer v. Whitmore, 5 Sim. 170.

Mr. Pemberton, in reply.—This suit was instituted for an account of the property of Mrs. Davies, left unadministered, and an execution of the trusts of her will ; and having regard to the authorities referred to, and the propositions advanced, there is nothing to throw an obstacle in the way of the claim of the plaintiffs except the dictum of Sir John Leach in *Vawdry v. Geddes* (5), that the presumption of a gift of personalty vesting in the legatee, because the intermediate interest is given to him, fails when the legacy is to go over on the happening of a certain contingency. The dictum did not arise out of the facts of that case, and cannot be supported. Here the contingency is, all the children of William Davies the younger dying under the age of twenty-one years ; and, upon the facts of the case, there is no reason why the children should not be considered as having vested interests in the residuary fund of the testatrix ; and for this reason, because the interest is not to be paid to them as a separate gift, but as belonging to the capital. Here, there is no distinct gift of the interest, but an expressed intention that it should be applied during the respective minorities of the children, for

their support : and how could it be so applied unless it vested at the death of William Davies ? It is said, a gift of personalty is vested when the whole intermediate interest is given to the legatee, because the legatee is then the sole object of the testator's intended bounty, but that the gift to the children of William Davies is not vested, because of the hiatus between the times of their respectively attaining their ages of twenty-one years and the period of distribution, during which there is no provision concerning the interest. My answer to that is, that although you cannot generally imply an immediate gift of capital from an intermediate gift of interest, unless the entire interest be given up to the time of division of the capital, still you must imply a present gift of the residue here, because the capital fund is first given to the legatees, and their right to the intermediate enjoyment of the income of the fund follows the capital, and belongs therefore to the legatees of their own right, and without any express directions being required for payment of it to them. If the Court can by any construction give the testatrix the means of dying testate, it will accomplish it ; and the testatrix, having shewn an intention that the interest should belong to the capital fund, no violence can be done to the rules of law by declaring that the residuary bequest to the children of William Davies the younger is a good and valid bequest. The following cases, in addition to the above cases, were cited :—

Bland v. Williams, 3 Myl. & Keen, 411 ;
s. c. 3 Law J. Rep. (N.S.) Ch. 218.

Jarman's Treatise on Wills.

Blease v. Burgh, 2 Beav. 221 ; s. c. 9 Law J. Rep. (N.S.) Chanc. 226.

Batsford v. Kebbell, 3 Ves. 363.

Lovell v. Strange, recent case in the House of Lords.

Scott v. Bargeman, 2 P. Wms. 69.

Skey v. Barnes, 3 Mer. 335.

Feb. 26.—THE MASTER OF THE ROLLS.
—In this case, the question depends on the construction which ought to be given to the residuary bequests contained in the will of Ann Davies. James Davies by his will gave his residuary estate to his wife absolutely and for ever, and by a codicil he directed, that if she died without making a will, the remainder of his property should

(3) 1 Jac. & Walk. 154.

(4) 3 Sim. 538.

(5) 1 Russ. & Myl. 208 ; s. c. 8 Law J. Rep. Chanc. 63.

be equally divided among the four children of his brother William Davies. James Davies died leaving his wife surviving him, and she was absolutely entitled to dispose by her own will of the residuary estate bequeathed to her by her husband's will. By her will, she recited the will of her husband, and declared her purpose to dispose of all his estate, and also of her own estate; and, having thus declared her purpose, she proceeded, without making any distinction between his estate and her own, to dispose of the whole as if it had been her own; and I think she has done it in a manner sufficient to pass both. After giving several legacies, she gave the residue and remainder of her personal estate to Fisher and Powell, upon trust to sell and to pay her debts and pecuniary legacies, and to set apart a sufficient sum to answer the annuities, and to invest the surplus in their joint names, and to stand possessed of the securities in which the same should be invested, in trust, during the life of William Davies, to pay the interest, dividends, and annual produce of her residuary personal estate to him; and then she proceeds as follows:—"And from and after the decease of the said William Davies, in trust for the children of the said William Davies, as they severally attain the age of twenty-five years, equally to be divided between them, if more than one; and if but one, then the whole to such one child; the income to be applied during their respective minorities by the guardians, for the time being, of the said children or child, for their respective support, maintenance, and education; and in case no child of the said William Davies shall live to attain the age of twenty-five years, then in trust for the children of the said James Davies" in the manner she has pointed out. The question is, whether the gift to the children of William Davies is void for remoteness. And it is necessary to consider, first, the effect of the direction to divide between the children as they severally attain the age of twenty-five years; secondly, the effect of the direction to apply the interest during the minorities of the children, for their support, maintenance, and education; and thirdly, the effect of the gift over. As to the first point, I think, that if the direction to divide had stood alone, the gift would be too remote, as in the case of *Leake v. Robinson*. It is only through the me-

dium of the direction given to the trustees, that you can ascertain who are the persons intended to take, and what are the benefits intended for them. The trust is, for all the children of William Davies, as they severally attain the age of twenty-five years; none were to be excluded, and none were to have anything till the age of twenty-five years was attained. This is too remote. But expressions of this kind, of themselves importing a postponement of the vesting, may be so controuled by other expressions and circumstances as to postpone payment or possession only, and not the vesting. And it has been held, that a direction to apply the interest for the benefit of the legatees, affords evidence of intention to vest the capital. And it has not been disputed, that if the testator had directed the whole interest to be applied for the benefit of the legatees during the whole time between the death of the tenant for life and the time of payment, and if there had been no gift over, it must have been held, that the capital was vested; but as the direction does not extend to the whole time, but is confined to the minorities of the children, and as the application is to be by the guardians for the support, maintenance, and education of the children, it was argued, that the interval between the twenty-one years and the twenty-five years of age of each child, during which there is no direction to apply the interest, prevents that direction from being considered as a direction to apply the whole interest, and therefore does not afford a presumption that the capital was intended to vest. In the cases of *Hoath v. Hoath* (6), and *Murray v. Addenbrook*, and many other cases, the direction was to apply the interest without exception, and the gift was held to be vested. In *Leake v. Robinson*, *Bull v. Pritchard* (7), and other cases, the trustees had authority or power to apply the interest of so much as they might think proper or deem necessary, towards the maintenance of the children; and in the case of *Vaudry v. Geddes*, the interest was at the discretion of the executors to be applied for the maintenance and education of the children, or accumulated for their benefit until they should severally attain the age of twenty-two years; and in

(6) 2 Bro. C.C. 3.

(7) 1 Russ. 213.

those cases it was held, that, notwithstanding the power, authority, or discretion to apply the interest, or part of it, to the maintenance of the children, it was the vesting, and not merely the time of payment, that was postponed. But too much reliance must not be placed on the expression, "the whole interest," that is used in some of the cases. In *Lane v. Goudge* (8), 30*l.* a year was given out of the interest to a party for life, and in *Jones v. Mackilwain*, an annuity of 100*l.* a year was given out of the interest to the father of the children; and in *Bland v. Williams*, there was a direction, and not a mere power or authority, to apply the interest, or a sufficient portion thereof, to the maintenance of the children, and to transfer so much of the interest as was not applied to their maintenance when they should attain the age of twenty-four years; and in those cases the gift was held to be vested. I have found no case precisely like the present, in which, the payment being postponed for a long minority, the express direction to apply the interest extends only to the minority. The case is, that the testatrix, having expressed the trust as to her residuary estate for the children of William Davies, makes no distinct gift of the interest; but proceeding as if she had already done what was requisite to entitle the children to interest, she directs the interest to be applied for their support, maintenance, and education, by the guardians during their minority. It appears to me, that she expresses herself as if she considered the children entitled to the interest, by the direction to divide the capital at a future period. The inference or implication arises from the direction to apply the interest. There is a gift payable at a future time, and a direction shewing that the children are to have the benefit of the interest on the death of the tenant for life. This direction expresses that during the minority the interest is to be applied by the guardians for the support, maintenance, and education of the children; and there is no express direction of the application of the interest after the minorities ceased. At that time, therefore, the mode of enjoyment expressly directed ceased; but I do not think it is therefore to be concluded that there is to be no enjoyment. And on this part of the

case, it appears to me, that the direction in the second part of the residuary bequest, as to the application of the interest, qualifies the first part—the direction for the division of the residue; and that the direction for division of the residue, followed by the direction to apply the interest, would, without more, give vested interests in the residue to the children of William Davies. But then, it is argued, that the gift over is wholly inconsistent with that conclusion, and shews the testatrix could not have intended to give vested interests. The arguments rest entirely on the dicta of Sir John Leach in the cases of *Vaudry v. Geddes*, and *Bland v. Williams*. In *Vaudry v. Geddes*, that learned Judge is reported to have expressed himself thus:—"Where interim interest is given, it is presumed, that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property; but that presumption fails entirely when the testator has expressly declared that the legacy is to go over in case of the death of the legatee before a particular period." And in *Bland v. Williams*, he is reported to have said,—"If the gift over is simply upon the death under twenty-four, then the gift could not vest before that age." It is to be observed, that in neither of those cases did the facts require any decision on the points to which these dicta relate. In *Vaudry v. Geddes*, the gift over to the surviving children of any of the sisters, was on the death of any such children without leaving issue; and the gift over to the surviving sisters and the children of any of them, was on the death of all the children of any of the sisters without issue. The case related to a share of the residue, not to a particular legacy; and there was no distinct gift of interest, but a direction to apply and accumulate the interest for the benefit of the legatees till they attain the age of twenty-two. In the case of *Bland v. Williams*, the gift over was on the death of any of the children under twenty-four without leaving issue, and the gift was held to be vested. The proposition which, in argument, was founded on the dicta of Sir John Leach is, that in a case where there is a gift payable at a future time, in terms which, in themselves, import contingency, and subsequent direction to apply the interest in such man-

ner as would, in the absence of any gift over, vest the residue; yet the mere circumstance of a gift over, simply on the death before the time of payment, does itself prevent the vesting. Now, in ordinary cases, the gift over upon a contingency does not of itself prevent the vesting in the first donee; for, although it is reported, that in the case of *Scott v. Bargeman*, Lord Macclesfield stated the reason of his decision to be, that the share of the legatees did not vest absolutely in any of them, in regard it was possible all might die under twenty-one or marriage, in which case it was devised over; yet, in *Skey v. Barnes*, Sir William Grant observed, that the reason seems to imply a proposition that is untenable in point of law, namely, that the mere circumstance of all the shares being given over on a contingency, does of itself, and without more, prevent any of the shares from vesting in the meantime; and, he added, that he took it to be clear, that a devise over, upon a contingency, has no such effect, provided the words of the bequest be in other respects sufficient to pass a present interest. Such a devise over of the entirety may, indeed, be called in aid of other circumstances, to shew that no present interest was intended to pass: but that it is alone sufficient to prevent vesting, cannot, I think, be maintained. Now, in the present case, it appears to me, that the words of the bequest to the children of William Davies are sufficient to pass a present interest. Such appears to me to be the true construction of the words the testatrix has used; and when we have once reached the result or meaning of the words under consideration, I apprehend effect should be given to that meaning, just as if it had been expressed in direct and unambiguous terms. The meaning, indeed, must be collected from the whole will, and every part of it must be taken into consideration; but the gift over does not appear to be accompanied by any other circumstances tending to shew that no present interest was intended to pass, but, on the contrary, affords some evidence of an intention to divest after a previous vesting: and, on the whole, it appears to me, that the residuary bequest to the children of William Davies the younger is a valid bequest.

M.R.
Feb. 12; Apr. 18. } ASHTON v. M'DOUGHALL.

Baron and Feme—Settlement—Wife's Reversionary Interest.

The reversionary interests of a married woman are not assignable as against herself surviving her husband; but the assignment of such as fall into possession during her coverture may be valid.

John Starie, by his will, dated the 3rd of October 1812, gave and devised to George Trimby and John Thomas Redman all his freehold estates, upon trust to pay the rents thereof to Mrs. Sarah Russell, for her life; and immediately after her decease, in trust for the sole use and benefit of her granddaughter, Susannah Eliza Paddon, if living at the time of his decease. And he gave and bequeathed unto his said trustees the sum of 5,000*l.*, 3*l.* per cent. bank annuities, upon trust to pay the interest, dividends, and proceeds thereof unto Mrs. Sarah Russell, for her life; and after her decease, to transfer the same into the name of, and that the same should become the sole property of the said Susannah Eliza Paddon, for her own use and benefit, together with all dividends then due. And the said testator bequeathed his leasehold property unto his said trustees, upon such trusts for the benefit of Mrs. Susan Wright as are therein mentioned; and in case she should die before the expiration of the said leases, then upon trust to sell the same, and stand possessed of the proceeds thereof, for such of the children of his daughter, Elizabeth Paddon, as should be then living, equally, to become vested and payable to them at their respective ages of twenty-one. And the testator gave unto his said trustees the interest and dividends of a further sum of 5,000*l.*, 3*l.* per cent. bank annuities, upon trust to pay the same unto and to the separate use of the said Mrs. Susan Wright, for her life; and immediately after her decease, upon trust for the said Susannah Eliza Paddon, for her own use and benefit, with a direction that the principal should be assigned to her upon her attaining the age of twenty-one. And as to all the rest and residue of the said testator's estate and effects, he gave, devised, and bequeathed the same unto his said trustees, upon trust

to stand possessed of the proceeds thereof, and to pay amongst the children of his said daughter, Elizabeth Paddon, who might be living at the time of his decease, equally, upon their attaining their respective ages of twenty-one years. And the said testator further gave and bequeathed unto his said grandchildren, and to the survivors and survivor of them, the sum of 2,000*l.*, 3*l.* per cent. bank annuities, the interest and dividends thereof to be paid to them in equal shares until their respectively attaining twenty-one, and the principal to be transferred to them upon their severally attaining twenty-one, equally. And the said testator in like manner gave to his grandchildren 400*l.*, long annuities, for their own uses and benefits; and he appointed the said George Trimby and John Thomas Bedman to be the executors of his will. The testator died in March 1815, and his will was proved by the said George Trimby alone. The testator left him surviving, the said Sarah Russell, Susan Wright, Susannah Elizabeth Paddon, and three other children of the said Elizabeth Paddon.

In Trinity term, 1815, a suit was commenced, intituled, "*Gullan v. Trimby*," for obtaining payment of certain legacies given by the testator's will, under which the accounts were duly taken; and by certain orders therein, two several sums of 8,000*l.*, 3*l.* per cent. bank annuities, were transferred into the name of the Accountant General, in trust in the cause, the one sum being carried to the account of Sarah Russell, for her life, and the other to the account of Susan Wright, for her life; and the sum of 100*l.*, long annuities, was carried over to the account of Susannah Elizabeth Paddon, as her share of the 400*l.* long annuities, given by the testator's will to the children of his daughter, Elizabeth Paddon. The testator's personal estate was found to be insufficient to satisfy his pecuniary and stock legacies, and the residue thereof was therefore apportioned amongst the legatees; and the sum of 653*l.* 7*s.* 2*d.* sterling was apportioned in respect of the said legacy of 2,000*l.*, 3*l.* per cent. bank annuities, given to the children of the said Elizabeth Paddon; and the share thereof of the said Susannah Elizabeth Paddon was laid out in the purchase of 151*l.* 4*s.* 3*d.*, 3*l.* per cent. bank annuities, and carried over to the account

of the said Susannah Elizabeth Paddon. On the 8th of June 1818, Susannah Elizabeth Paddon, being then an infant, intermarried with one James Harnett; and shortly afterwards a suit was instituted, on behalf of the other children of the said Elizabeth Paddon, against the acting executor, George Trimby, and James Harnett and his wife, under the title of "*Paddon v. Trimby*," to administer the testator's estate; and an order was made in the two causes, on the 8th of December 1818, referring it to the Master to approve of a proper settlement to be made on the said Susannah Elizabeth, then the wife of James Harnett. An indenture of settlement, dated the 12th of July 1819, was accordingly made and executed by and between the said James Harnett, and Susannah Elizabeth, his wife, of the one part, and Alexander M'Doughall and Thomas Dobson of the other part, whereby the said James Harnett covenanted, that as soon as his wife should attain the age of twenty-one, he and she would levy a fine of the real estate devised to her by the testator's will, and the leaseholds and other personal estate bequeathed thereby unto her were assigned unto the said Alexander M'Doughall and Thomas Dobson, upon trust to pay the income thereof as the said Susannah Elizabeth Harnett should appoint, notwithstanding her present or any future coverture, but not by way of charge, assignment, or anticipation; and in default thereof, to pay the same to the said Susannah Elizabeth Harnett, for her own sole and separate benefit, free from the debts and engagements of the said James Harnett or any future husband; for which purpose it was thereby declared, that the receipts of the said Susannah Elizabeth Harnett should be a good discharge for the same; and after her decease, upon trust for the children of her then present or any future coverture, as she should appoint; and in default of appointment, to her children in manner therein mentioned.

Susannah Elizabeth Paddon attained twenty-one on the 24th of December 1821; and a fine was shortly afterwards levied of the freehold estates, in pursuance of the covenant contained in the said settlement.

Mrs. Sarah Russell died in January 1823; and shortly after, an order was made, upon the petition of the said Alexander M'Doughall and Thomas Dobson, for a transfer of

the 5,000*l.*, 3*l.* per cent. bank annuities, then standing to the account of Sarah Russell, for her life, to the account of Susannah Elizabeth Paddon. The 5,000*l.*, 3*l.* per cent. bank annuities, was not carried over under the above order; but by virtue of a subsequent order, made after the death of the said James Harnett, which happened in August 1828, and after the marriage of Susannah Elizabeth Harnett with Charles Edmund Birch, which happened in 1829, and by an order dated the 19th of December 1829, it was ordered, that the long annuities should be transferred from the account of Susannah Elizabeth Paddon to Alexander M'Doughall and Thomas Dobson. Susan Wright died on the 12th of June 1830, whereupon an order was made for transferring the 5,000*l.*, 3*l.* per cent bank annuities, from the account of Susan Wright, for her life, to M'Doughall and Dobson, on the trusts of the settlement of the 12th of July 1819. On the 30th of March 1811, Charles Edmund Birch died; and on the 18th of June 1832, Susannah Elizabeth Birch intermarried with the plaintiff, Robert Ashton. No settlement of the property of Mrs. Ashton was executed upon her marriage with Birch or with the plaintiff. There were four children of the marriage of Mrs. Ashton with James Harnett, and one by her marriage with the plaintiff. In the year 1837, a separation took place between the plaintiff and his wife; and in June 1838, the plaintiff filed his original bill in this suit, whereby he insisted, that the settlement did not bind the separate property of his wife, or at least such as was expectant or reversionary, or did not fall into possession during the life of Harnett, or as would not have vested in Harnett if a settlement had not been made; and therefore, the two several sums of 5,000*l.*, 3*l.* per cent. bank annuities, and the share of Mrs. Ashton in the leaseholds, which were at the time of the marriage vested in her, free from the trusts of the settlement, before the marriage of the plaintiff with Mrs. Ashton, became the absolute property of the plaintiff in her right. And the bill, after charging various breaches of trust against the trustees of the settlement, prayed, that the rights of the plaintiff, and of his wife, and their children, might be ascertained; and that it might be declared, that the estate and interest of Mrs. Ashton in the trust pre-

mises under the indenture of settlement, was not subject to her separate use; and that the plaintiff, in right of his wife, was entitled to the same. It appeared, that a fine of the real estates had been duly levied in the lifetime of Harnett; that at the time of the marriage of the plaintiff with Mrs. Ashton, the trustees of the settlement, with the knowledge and consent of the plaintiff, received the income and the arrears then due of the property contained in the settlement; and that the plaintiff, at the time of his marriage and afterwards, was cognizant of the contents of the settlement, and acquiesced therein. The principal question was, whether the two several sums of 5,000*l.* and the leasehold property of Mrs. Ashton were bound by the settlement of 1819, upon her surviving her former husbands; and whether such settlement was valid against the plaintiff.

Mr. Pemberton and Mr. Hubback, for the plaintiff.—By the will of Starie, Mrs. Ashton became entitled to two sums of 5,000*l.* stock, expectant on the deaths of certain persons named in the will, and also to certain leasehold property, none of which property had been reduced into possession at the date of the settlement in 1819, which was executed after her marriage with Harnett, and during her infancy. By that settlement, Mrs. Ashton debarred herself of the power of touching her fortune during her life, and of raising any sums, even for necessities; and the first question is, whether her interest was concluded by such settlement. The plaintiff contends, that Mrs. Ashton did not part with her property by the settlement, because she was a minor; and that Harnett had no power thereby to bind the interests of his wife surviving him, although he could have bound his own interests and those which he might have acquired during the coverture. If this be so, neither Harnett nor Birch having reduced the interest of Mrs. Ashton in the stock in the leaseholds into possession during their respective covertures, it follows, that the property was unfettered by the settlement on Ashton's marriage, and that he is now entitled to it, subject to a settlement thereof, as he has never in any way acquiesced in the settlement.

Mr. Kindersley and Mr. Purvis, for Mrs. Ashton.—The plaintiff had no thoughts of filing his bill until after the decision of

Massey v. Parker (1), which gave him the first idea that the property was not bound to the separate use of Mrs. Ashton; and before that time, he never disputed the settlement; on the contrary, he acquiesced in it, and the income was received by the trustees under a power of attorney, executed by Mrs. Ashton, with his consent. Suppose, however, the claim of the plaintiff to be well founded, the Court will not disturb the settlement already made—*Middlecome v. Marlow* (2); and even if Mrs. Ashton, on her marriage with the plaintiff, had desired to destroy the settlement, yet as Mr. Ashton recognized it, the Court will not now declare it to be disturbed. Besides, the length of time precludes him from setting up the rights he now claims; and he knew of the existence of the settlement before marriage, and is therefore bound by it. The law is established, that when there is a settlement made by the family of an infant previously to the marriage, it will bind the wife surviving and any future husband—*Harvy v. Ashley* (3). The one sum of 5,000*l.* stock, fell into possession during the life of Harnett, and the other sum of 5,000*l.* during the life of Birch, the second husband; and by orders of the Court, they were transferred into the names of the trustees of the settlement. Harnett and Birch well knew the reasonableness of allowing these sums to be vested in the trustees; and can a subsequent husband put himself in a better position than they were in? Various other orders affecting the property were afterwards made, without any complaint by the plaintiff than by filing his bill; and he now asks for a decree to treat all these orders as a nullity, and to get possession of the funds, without having any property of his own to give any dower to his wife.

Mr. G. Turner and *Mr. Lewis*, for the children;

Mr. Tinney and *Mr. Bagshawe*, for the trustees; and

Mr. Wood, for other parties, cited—

Donne v. Hart, 2 Russ. & Myl. 360;
s. c. 1 Law J. Rep. (N.S.) Chanc. 57;

Trollope v. Linton, 1 Sim. & Stu. 477;
s. c. 2 Law J. Rep. Chanc. 3;

(1) 2 Myl. & K. 174; s. c. 4 Law J. Rep. (N.S.) Chanc. 47.

(2) 2 Atk. 519.

(3) 3 Ibid. 610.

Johnson v. Johnson, 1 Keen, 648; s. c. 6 Law J. Rep. (N.S.) Chanc. 306.

Woodmeston v. Walker, 2 Russ. & Myl. 197; s. c. 9 Law J. Rep. Chanc. 257; in support of their argument, that the chose in action of a wife surviving her husband would not be bound by her marriage settlement; and—

Adamson v. Armitage, 19 Ves. 416;

Ex parte Ray, 1 Madd. 199;

Stanton v. Hall, 2 Russ. & Myl. 175;
s. c. 9 Law J. Rep. Chanc. 111;

Tyler v. Lake, 2 Russ. & Myl. 183;

on the construction of the terms "sole property," and "own use and benefit," in the will of Starie, and their operation in giving to Mrs. Ashton a separate estate in the two sums of 5,000*l.* stock.

Mr. Pemberton, in reply.—The plaintiff is entitled to the capital of the funds, subject to a settlement which the Court must make, having regard to all the circumstances of the case; and the main point is, whether the funds were given to the separate use of Mrs. Ashton by Starie's will. By this will, 5,000*l.* stock is given to Mrs. Russell for her life; and after her decease, the trustees are directed to transfer the same into the name of, and that the same may become the sole property of, Mrs. Ashton, for her own use and benefit; and the other 5,000*l.* stock is given to the trustees, after the death of Mrs. Wright, upon trust for Mrs. Ashton, for her own use and benefit. The word "sole" is introduced in reference to subsequent words and expressions; and though there are decisions in which such words as "sole" and "her own" have been held to give a separate estate, those cases have been decided upon construction. In the case of *Adamson v. Armitage*, the expression of Sir William Grant would not have arisen, unless it had been that the income was to be paid into the hands of the trustees; and the words of the gift were absolute, being "sole use and benefit." In *Ex parte Ray*, the gift was to a married woman; and the effect was to guard against the marital right. No decision meets this case, which depends on the context. The argument, that an infant may be bound as to property by a settlement made by a guardian during her infancy, is good to some extent; but it is clear, that the settlement will not affect any property not reduced into possession during the marriage—

Simson v. Jones, 2 Russ. & Myl. 365 ;
s. c. 9 Law J. Rep. Chanc. 106.

Johnson v. Johnson, 1 Keen, 648 ; s. c.
6 Law J. Rep. (n.s.) Chanc. 306.

Tullett v. Armstrong, 1 Keen, 429 ; s. c.
5 Law J. Rep. (n.s.) Chanc. 303.

and the doubt is, whether it will affect such property as the husband has the power of reducing into possession during the marriage, but did not do so. The settlement was made after the marriage of Mrs. Ashton, when she could not contract concerning her property, nor could Harnett contract to bind the interest of his wife surviving him.

Stamper v. Barker, 5 Mad. 157.

Hutchings v. Smith, 9 Sim. 137 ; s. c. 7
Law J. Rep. (n.s.) Chanc. 188.

Harnett had the power to reduce into his possession the 5,000*l.* stock, expectant on the death of Mrs. Russell ; but as he did not do so, nor do anything equivalent to it, the stock was not bound, but survived to the wife immediately upon Harnett's death, as if no settlement had ever been made ; and the same may be said concerning the 5,000*l.* which fell in during the second marriage. And it not only appears that the former husbands did not conclude the interests of Mrs. Ashton, but that they themselves thought they had not done so ; and therefore, upon their deaths the funds in question survived to Mr. Ashton, without any objection that a settlement of them had been executed, or that any of them had been bound by a reduction into possession during the lives of her former husbands. Whatever agreement may have been entered into between Mrs. Ashton and Birch in reference to the settlement, cannot affect Mrs. Ashton, who can only be bound to the extent of the validity of it. If he is bound by it, it is by no contract or understanding. Suppose he knew of the settlement, and believed it to be binding, and staked his chance upon it, still if there be no contract, you can go no further than the settlement. If it be shewn that Ashton knew the instrument to be invalid, and intended to confirm it, the Court would decree a confirmation ; but it has not been argued that an act of confirmation by a party ignorant of his right is of no effect.

April 18.—The MASTER OF THE ROLLS (after stating the prayer of the bill, and the material facts of the case) said—I do not

find anything which, as it appears to me, ought to induce the Court to consider the settlement as invalid for the protection of Mrs. Ashton. The first marriage took place during her infancy ; and the interests to which she was entitled, and which formed the subject of the settlement, were for the most part reversionary. The reversionary interests of a married woman are not assignable as against herself surviving her husband ; but an assignment of a reversionary interest which falls into possession during her coverture, may be valid ; and there seems to be no reason why a married woman may not, after the coverture has ceased, adopt an assignment made during the coverture for her own benefit during the whole of her life, and for the benefit of her children after her death. A part of the reversionary interest fell into possession during the life of her first husband, who claimed and received the benefit intended for him by the settlement, and was bound by it. After his death, I think that the wife surviving him, and not claiming to have the funds transferred to herself, must be deemed to have acquiesced in and adopted the settlement, if it was for her interest to do so. I conceive she ought to be deemed to have married her second husband, Mr. Birch, on the faith that her property was protected by that settlement, and that he was bound by it ; and he seems to have considered himself to be so. The remainder of her reversionary interest fell into possession during his life, and became subject to the settlement, and so continued to be at the time of his death, when the lady again became a widow. Within three months after the death of Mr. Birch, she married the plaintiff ; and if a single woman entitled to property limited to her sole use, free from the controul of any husband she might marry, ought to be deemed, by the act of marriage, to have conferred such property on her husband, or if she had practised any fraud upon him, by misrepresentation respecting the property, or giving him reason to suppose he would become entitled to it in her right, Mr. Ashton might have been entitled to relief. But the case is entirely different. A limitation to the separate use of a woman, though she may be at the time single, may enure for her benefit after her marriage ; and Mr. Ashton, in this case, before his marriage, was perfectly well ac-

quainted with the settlement. He married his wife knowing that her property was limited to her separate use; and for some years after the marriage he entirely acquiesced in it. Under the circumstances, therefore, I am of opinion that the plaintiff is not, in right of his wife, entitled to any part of the property which he claims; and that the whole foundation on which he asks for relief entirely fails. It was argued, that the plaintiff, if not entitled to more, was at least entitled to such part of the income as became due between the death of Mr. Birch and her marriage with the plaintiff; but I am of opinion, that anything she was entitled to when she married, was due to the trustee for her benefit, and was subject to the trusts, and payable to her after her marriage for her separate use. And as the plaintiff appears to me to have no interest in the property comprised in the settlement, I can give no relief even in respect of those breaches of trust which are alleged in the bill. It must, therefore, be dismissed with costs against all the defendants.

M.R. }
May 2, 6. } EVANS v. BROWN.

Escheat—Statute.

Under the 3 & 4 Will. 4. c. 104, the estate of the lord of a manor by escheat, is assets for payment of the debts of the tenant who dies without heirs.

Thomas Llewellyn Parry, by his will of the 16th of June 1834, devised to Thomas Parry Thomas, his heirs and assigns, his farm and lands called Nanty-popty, in the county of Cardigan; and he devised all his other real estates in the several counties of Cardigan, Carmarthen, and elsewhere, to his, the testator's, natural and reputed daughter, Judith Parry, for her life, with remainder to trustees and their heirs during the life of Judith Parry, in trust, to preserve contingent remainders, with remainder to the use of her first and other sons in tail male, with remainder to her daughters as tenants in common in tail, with remainder to his, the testator's, right heirs for ever; and he thereby appointed Thomas Lloyd and James Michael Lewis Lloyd his executors. The testator died in

November 1836, without leaving an heir, and James Michael Lewis Lloyd alone proved his will, Thomas Lloyd having disclaimed the trusts, and renounced the probate thereof. On the 5th of December 1836, a creditors' suit was instituted in this court, intituled *Brown v. Lloyd*, for the administration of the estate of the testator, in which a decree was duly pronounced, and the usual reference was directed to the Master, who, by his report, found that debts had been proved to the amount of 8,609*l.* 2*s.* 9*d.*; and he also found that the testator, at the time of his death, was not seised of or entitled to any copyhold or customary estate whatsoever, and he did not find that he had any heir-at-law or next-of-kin, but that he died seised of certain freehold estates situate in the counties of Cardigan and Carmarthen to the amount of 859*l.* per annum. The cause coming on to be heard on further directions, it was declared, that the reversion of the testator's real estates, by his will expressed to be devised to his own right heirs, was the primary fund applicable in aid of the testator's personal estate, to pay his debts; and it was ordered, that the plaintiffs should be at liberty to make such application to the Crown as they should be advised, relating to such reversion; and further directions were reserved. The plaintiffs presented the memorial to the Lords of the Treasury, stating, that the personal estate was insufficient for payment of the testator's debts, and that the reversion of the testator's real estates devised to his own right heirs had, by his death without heirs, escheated and devolved to her Majesty, by virtue of her royal prerogative, and that the reversion was the primary fund applicable in aid of the testator's personal estate to pay his debts; and praying that the Lords of the Treasury would issue their warrant, granting to the memorialists, acting for and on behalf of themselves and the other unsatisfied creditors of the testator, the reversion of the real estates of the testator, devised to his own right heirs to them, and that the same might be sold, and the proceeds thereof might be applied by the memorialists, acting under the authority and sanction of the Court of Chancery, in aid of the testator's personal estate in payment of the costs of the suit and the testator's debts, in the same manner as such reversion would, but for the testator's dying

without heirs, have been applicable. By a warrant under the sign manual of the 15th January 1841, reciting an inquisition, by which it was found, that the reversion in fee on the death of Judith Parry without issue, escheated to the Crown, Her Majesty granted the said reversion to the memorialists and their heirs, upon trust, to make sale and dispose thereof, under the direction of the Court of Chancery; and after payment of the expenses of the inquisition, and of the sale, to apply the proceeds in such manner as the Court of Chancery should direct, in aid of the testator's personal estate in the payment of his debts, in the same manner as if the reversion had not escheated. No steps were taken with the view to a sale of the reversion, in consequence of the claim of Edward Hamlin Adams to be entitled to the reversion in fee expectant on the death, without issue, of Judith Parry, of the hereditaments devised to her for life, situate in the county of Cardigan, as the lord of certain manors, of or under which the testator's estates were held, in discharge of the testator's debts. A supplemental bill was accordingly filed against the trustees and Edward Hamlin Adams, raising the issue, whether the reversion was in the grantees of the Crown or in Edward Hamlin Adams, free from the testator's debts, and praying that it might be sold, or a sufficient part thereof, for the payment of the testator's debts, and that, if necessary and proper, it might be ascertained and declared who had the legal title in the reversion. Edward Hamlin Adams, by his answer, set forth a grant which was made to him, his heirs, and assigns, by the Crown, on the 18th of December 1829, of three manors or lordships in the county of Cardigan, with the quit rents and other customary rents thereto belonging, and he claimed to be entitled to the reversion of the estates devised to Judith Parry, as forming part of such manors, and in right of them freed from the testator's debts; and also certain sums of money on account of mortuaries or quit rents, as lord of such manors: and he insisted, that in case the reversion was held to be applicable to the payment of the testator's debts, it was only applicable after the exhaustion of the testator's other property.

Mr. Turner and *Mr. Pitman*, for the plaintiffs in the supplemental suit.

Mr. Tinney and *Mr. Hislop Clark*, for the plaintiffs in the original suit.

Mr. Kenyon Parker, *Mr. Spence*, and *Mr. Wood*, for other parties.

Mr. Wray, for the Crown.

Mr. Pemberton and *Mr. Bates*, for the defendant, Edward Hamlin Adams, insisted that the record was improperly framed, by which Adams was compelled to contest with co-defendants the title to an estate which could not be decided in this suit, but by writ or other proceedings at law, as by *scire facias*, or traversing the inquisition; that the object here was to make one man's estate accountable for the debts of another, for the lord by escheat did not claim under the tenant, but he claimed that estate which was never granted to the tenant, and which remained in him, and came into possession after the determination of the tenant's estate; that the estate by escheat of the lord was in part the same as that of the reversion of a lessor not liable to be charged or incumbered by the debts of the tenant. They also insisted, that the statute 3 & 4 Will. 4. c. 104, for rendering freehold and copyhold estates assets for payment of simple contract debts, and the 3 & 4 W. & M. c. 14, and the statutes for the relief of creditors, were *in pari materia*, and gave no remedies against the lord taking an estate by escheat on default of heirs of his tenant, but only against the devisees or heirs of the lord. The following statutes and authority were referred to—

36 *Edw.* 3. c. 13.

2 & 3 *Edw.* 6. c. 8.

8 *Hen.* 6. c. 16.

59 *Geo.* 3. c. 94.

1 *Hayes's Conveyancing*, 5th edit. p. 333.

1 *Will.* 4. c. 47.

Mr. Turner, in reply.—The defendant Adams objects to the form of the pleadings and to the rights of the plaintiffs on the merits; and he insists that they cannot bring the lord here to enforce their rights, and secondly, that they cannot do so to ascertain the extent of their rights. The bill seeks to establish the rights of creditors by raising an issue between co-defendants; and the question is, whether the plaintiffs have a right against the lord of the manor under the statute 3 & 4 Will. 4. c. 104. The plaintiffs contend, that the statutes carrying out the rights of

creditors, including the 3 & 4 Will. 3. c. 14, are *in pari materia*; but this is not so. By the 3rd section of the statute 3 & 4 W. & M. c. 14, a right and a co-extensive remedy is given against a devisee, and no other remedy is given; and by the following statutes for the benefit of creditors, namely, 47 Geo. 3. c. 74, 1 Will. 4. c. 47, particular rights are conferred upon creditors against the estates of their debtors; and the authorities of Mr. Bates on the construction of acts do not apply, as they refer to acts containing new remedies, and not new rights. The statute 3 & 4 Will. 4. c. 104. is sufficiently large to entitle the plaintiffs to the estates in question. The fact that Adams claims these estates is sufficient to entitle the plaintiffs to bring him before the Court, for the plaintiffs insist upon their title to the reversion in fee of certain lands against the trustees as to some of such lands, and against Adams as to others; and suppose a stranger claims adversely to a trust, and prevents the execution of it, but will not try the question, is the execution of the trust to be stayed, and is there to be no inquiry?—*Talbot v. Earl Radnor* (1). The following cases were referred to, in addition to the above:—

Burgess v. Wheate, 1 Eden, 186.

Weaver v. Maule, 2 Russ. & Myl. 97.

Rogers v. Maule, 3 You. & C. 74; s. c. 7 Law J. Rep. (n.s.) Ex. Eq. 76.

Basset v. Basset, 3 Atk. 203.

May 6.—THE MASTER OF THE ROLLS, after stating the facts of the case, said,—It does not appear to have been admitted or ascertained whether any parts of the estates devised to Judith Parry, are comprised in the manors granted to Adams; and Adams, not being a party to the original cause, is not bound by any of the proceedings in it. He claimed to be entitled to the reversion of such of the testator's lands only as were held of the manors belonging to him; and the principal question is, whether the lands of which the testator died seised, without having charged them as assets for the payment of his debts, are assets to pay creditors when he dies without an heir.—His Lordship then strictly compared the provisions of the several statutes before cited; and after referring to the argument on the part of Adams,

that the words “heir” and “devisee” only being mentioned in the statute 3 & 4 Will. 4. c. 104, indicated an intention to confer a remedy against the heir and devisee only, and to make no provision for the case of a person dying without an heir, said, that the present statute, 3 & 4 Will. 4. c. 104, makes all the estates which a person dies seised of or entitled to, assets for the payment of his debts, whether simple contract or specialty. The testator died after this act came into operation, without having charged his estate with the payment of his debts; and having regard to the words of the act, it would seem, that whoever succeeded to his estates, and in whatsoever right, was bound by them; that the right conferred by this act was not limited by the subsequent parts of the clause conferring the remedies. The creditors had a legislative provision that the estate should be assets; and in whatever way the right of the lord arose, he must take the reversion with the liability to which the legislature had subjected it, and cannot claim to have it free from the testator's debts. It was said, that if the reversion was charged, it ought not to be resorted to until the estates devised were exhausted; and considering that the whole estate is assets, it did not appear to him, that the reversion was necessarily the primary fund. The defendant Adams was not bound by the declaration, that the reversion was the primary fund applicable to the payment of debts; and he thought that Adams had a right to have the question argued independently. The decree directed an inquiry as to which of the estates devised were comprised in the manors of which Adams was seised or entitled to, and declared that the estates of which the testator died seised or entitled to, but without heirs, were subject to his debts under the statute. It also directed an inquiry as to what was due to Adams for quit rents and mortuaries, and reserved further directions and costs.

M.R. } THE DEAN AND CHAPTER OF ELY
May 10. } v. BLISS.

Tithes—Statute of Limitations, 3 & 4 Will. 4. c. 27.

To a bill for an account of tithes belonging to the plaintiffs, the defendants pleaded the

(1) 3 Myl. & K. 262.

statute 3 & 4 Will. 4. c. 27 : that neither the plaintiffs nor any persons through whom they claimed had been in possession or in receipt of the profits of the said tithes within twenty years next before the institution of the suit, and that no acknowledgment in writing had been given by the defendants, or any person in the possession or in the receipt of the said tithes within such time. Plea allowed, with liberty to the plaintiffs to amend their bill.

The plaintiffs were grantors of the manor and rectory of Lakenheath, in the county of Suffolk, and were entitled to the tithes thereunto belonging. The defendants were occupiers of lands within the manor, and the bill, amongst other things, contained a charge that the lands became productive within fifty years last past; that at the time of the passing of the statute 2 & 3 Will. 4. c. 100, which was in the year 1832, they were in lease, and that the defendants had taken titheable matter, in respect of such lands, since the 31st day of December 1837.

To this bill the defendants pleaded the 3 & 4 Will. 4. c. 27, and further, that neither the plaintiffs nor any persons through whom they claimed had been in possession or in receipt of the profits of the said tithes within twenty years next before the institution of the suit, and that no acknowledgment in writing had been given by the defendants, or any person in the possession or in the receipt of the said tithes within such time. The material charges in the bill are stated in the judgment.

Mr. Kindersley and Mr. Eagle, in support of the plea.—The defendants have never paid any tithes in respect of the lands which they occupy within the manor, and the right of the plaintiffs, if any, to receive such tithes, is barred by the statute 3 & 4 Will. 4. c. 27. The term "land," in that statute, includes land belonging to a spiritual corporation or a corporation aggregate. The plea is, that the plaintiffs have not been in the possession or in receipt of the tithes within twenty years from the institution of this suit; and the statute is meant to apply as well to lands as to incorporeal hereditaments, arising from corporeal hereditaments. If the right of the plaintiffs to receive tithes is founded on the 2nd section of 3 & 4 Will. 4. c. 27, such right must have been exercised within twenty years from the time

the right accrued. The plea alleges facts to bring the case within the statute, and denies those facts, and therefore the plea must be allowed.

Mr. Pemberton and Mr. Lloyd, for the plaintiffs.—The plaintiffs, as rectors of the rectory of Lakenheath, claim relief, not as separate owners of tithes, but as incident to their rectory, and against occupiers of lands confessedly within such rectory; and in order to state a sufficient case to meet the statute 2 & 3 Will. 4. c. 100, they allege, by their bill, that the lands in the occupation of the defendants were in lease at the time of the passing of that statute. The defendants have pleaded the statute 3 & 4 Will. 4. c. 27, and they contend, that the statute 2 & 3 Will. 4. c. 100, has been repealed by the statute 3 & 4 Will. 4. c. 27; and that if a party has been out of possession or the receipt of tithes for twenty years, though he prove preceding payments in respect of them, the right is gone; that the right of action is extinguished by twenty years non-payment; and, therefore, that all the cases which have been argued before the Commissioners of Tithes have been argued in mistake. The allegations in the bill are, that the lands have only produced titheable matters within the last fifty years, and that since December 1837, grain has been cut and taken away by the defendants; that in the year 1808, a bill was filed against the occupiers for an account of tithes due by them, and a decree was pronounced thereon; that in the year 1831, and at the respective times of the passing of the statutes 2 & 3 Will. 4. c. 100. and 3 & 4 Will. 4. c. 27, a lease was subsisting of the said tithes, and that the decree having been pronounced within twenty years next preceding, the plaintiffs were debarred from instituting proceedings for the recovery of them. If a party bring an action to try the right to tithes, such action must be commenced within twenty years; but otherwise, if such action be for the recovery of tithes becoming due *de anno in annum*, in which case, the 2 & 3 Will. 4. c. 100. is applicable, and relates to the non-render and non-payment of tithes, and not to the title to them, which is not the issue between the parties in the cause. Again, the defendants say, that the right and title to the tithes, if any, arose at the date of the grant of them to the Dean and Chapter of

Ely by Henry VIII. Is this so? The right of the plaintiffs is a right to the rectory and the tithes belonging to it, which right has been established by a decree pronounced within twenty years next before the passing of the statute 2 & 3 Will. 4. c. 100, which allowed to the plaintiffs on account of the lease, which was then subsisting of the said tithes, three years after the expiration thereof, to institute proceedings for the recovery of them; and the arguments of the defendants, that the statute 2 & 3 Will. 4. c. 100. is repealed by the 3 & 4 Will. 4. c. 27, is erroneous, for the latter statute makes no provision for lands originally waste brought into cultivation; nor does it provide for the case of leases of tithes subsisting at the time of the passing of it, nor does it refer to the former statute, or repeal it by any provision which may be or which is by certainty a revocation of the same. This plea cannot, therefore, found itself upon 3 & 4 Will. 4. c. 27; and being founded upon exemption or prescription, it should be that the right had not accrued within twenty years.

Mr. Kindersley, in reply.—The question is, have the plaintiffs or the parties, under whom they claim, been in possession or in receipt of the tithes within the last twenty years? and in case they have not been in such possession or receipt, then their right is barred, whether such question be raised between landlord and tenant, or between strange parties. The 2 & 3 Will. 4. c. 100. is applicable to tithes payable to all persons, as well to a corporation sole as a corporation aggregate, and is no Statute of Limitations. The object of the statute was, that inasmuch as a modus was frequently set up as a defence against the liability to pay tithes, and because of the difficulty of proving it, therefore the statute was meant to give a *prima facie* period, within which, if no payment could be shewn, the Court would presume a good legal title; but that is now *sub judice* before Vice Chancellor Wigram. The 3 & 4 Will. 4. c. 27. cannot have the operation which the plaintiffs contend for.

The following cases were cited:—

Nepean v. Doe d. Knight, 2 Mee. & Wels. 894; s. c. 7 Law J. Rep. (N.S.) Exch. 335.

James v. Salter, 3 Bing. N.C. 544; s. c. 6 Law J. Rep. (N.S.) C.P. 171.

NEW SERIES, XI.—CHANC.

Paddon v. Bartlett, 3 Ad. & El. 884; s. c. 4 Law J. Rep. (N.S.) Exch. 333.

THE MASTER OF THE ROLLS.—In this case the plaintiffs state themselves to be grantees under letters patent, dated the 10th of September, in the 33 Hen. VIII., of the rectory and parsonage of Lakenheath, and the tithes and appurtenances thereunto belonging. The bill alleges, that within the titheable places in the parish of Lakenheath there is a district called Lakenheath Fen, which was formerly unclosed and unproductive, but that the lands were afterwards partially drained, and, about fifty years ago, were brought into cultivation, and have since produced titheable matters of considerable value, the tithes of which, since the 31st of December 1837, ought, as the bill alleges, to have been rendered to the plaintiffs; that the defendants, among others, are occupiers of lands within the district, and have, since the 31st of December 1837, taken titheable matters without setting out any tithes for the plaintiffs, and refuse to do so. The bill charges, that the lands are not exempted from payment of tithes, and that in former times they were frequently under water, and were not, till about fifty years ago, brought into regular cultivation, and did not produce any corn or grain in any quantity, but that the tithes of lamb and wool of sheep fed there, were paid to the plaintiffs and their lessees, and that the tithes were paid to the vicar; and, by way of evidence that the lands were not exempt from the payment of tithes, it is charged, that the lessees of the plaintiff, in 1808, filed their bill in this court against certain occupiers of land, stated to be within the district, for an account of tithes; that the defendant to that bill alleged an exemption, but that, nevertheless, an account of tithes was decreed; and it is further charged, that, under an indenture, dated the 4th of March 1831, the rectory and tithes of Lakenheath were demised to a lessee for a term of years, which was surrendered on the 21st of December 1837, from which period the account of tithes is claimed. To this bill the defendant Roper Cash has pleaded the statute 3 & 4 Will. 4. c. 27; that neither the plaintiffs nor any persons through whom they claim, have or hath been in possession or receipt of the profits or of the tithes of Lakenheath Fen,

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or any of them, within twenty years next before the institution of this suit, and that no acknowledgment of the title of any of the plaintiffs to the tithes, or any of them, has ever been given to the plaintiffs or their agent in writing, signed by the defendant, nor to his knowledge or belief by any other persons or person in possession or receipt of the profits of the tithes within twenty years next before the institution of this suit. The case, therefore, as it appears on the bill and the plea, is, that the plaintiffs are entitled generally to the rectorial tithes arising within the rectory and parsonage of Lakenheath; that within the rectory there is a particular tract of land, called Lakenheath Fen; that the defendant is an occupier of land within that tract, and has taken titheable matters thereon existing, but that, within twenty years before the institution of this suit, the plaintiffs had not received any tithes arising from Lakenheath Fen, and no acknowledgment of theirs has been given or made. The question is, whether the plaintiffs' right, if any they had, is extinguished; or whether they are barred from their right or remedy by the statute 3 & 4 Will. 4. c. 27. By the 1st section of that act it is enacted, that the word "land" shall, in its meaning, extend to tithes other than tithes belonging to a spiritual and eleemosynary corporation sole. The 2nd section enacts, that after the 31st of December 1833, no person shall bring an action to recover land but within twenty years next after the time at which the right to bring such action first accrued to the person bringing the same. The 3rd section defines the time when the right to bring an action shall be admitted to have accrued in the particular case therein specified; and the 24th section enacts, that no suit of equity shall be brought after the period when the plaintiff, if entitled at law, might have brought an action; and the 34th section enacts, that at the end of the period of limitation, the right of the party out of possession shall be extinguished. The tithes sought to be recovered by this bill, not being tithes belonging to a spiritual or eleemosynary corporation sole, come within the meaning of the word "lands," as employed in this act of parliament, and the question is not as to all the tithes arising within the rectory or parsonage of Lakenheath, but only as to such tithes as

arose within the district of the rectory, which in the bill is distinguished by the name of Lakenheath Fen. On this occasion I must consider the plaintiffs entitled generally to the tithes arising within the rectory, and, independently of the statutes and of special circumstances, the plaintiffs would appear to have a right of action from the time of their original grant. The question therefore seems to be, whether there are in this case any particular circumstances to prevent the operation of the act. It is, in the first place, argued, that the effect attempted to be imputed to the act 3 & 4 Will. 4. c. 27, would entirely subvert the act 2 & 3 Will. 4. c. 100, passed in the preceding year for shortening the time required in claims of exemption from a discharge of tithes. I think it has been correctly observed on the two acts, that they have different objects; but it seems to me to be a sufficient answer to the objection to say, that if two inconsistent acts be passed at different times, the last is to be obeyed. Every act of parliament must be considered with reference to the state of the law subsisting at the time the act was passed, and when it came into operation. It cannot otherwise be reasonably construed, but every act is passed either for the purpose of making a change in the law, or for the purpose of better declaring the law, and its operation is not to be impeded by the mere fact, if fact it be, that it is inconsistent with some previous enactment. The next objection is, that the tithes now sought are demanded in respect of titheable matters, which were not produced till within twenty years before the filing of the bill; that no right of action could arise, nor could the statute have any operation in such a case, and that the plea ought to have alleged, that the titheable matters, in respect of which the tithes were demanded, were produced more than twenty years ago. The plea should be adapted to the bill; and this bill, after requiring the defendants to set forth an account of the corn, grain, lamb, wool, and all other titheable matters and things which have arisen on the lands of the defendants, and have been taken by each of them in each year, since December 1837, prays that an account may be taken, under the decree of the Court, of the tithes of such titheable matters as have been subtracted by the defendants. The bill prays, therefore, an

account of all titheable matters which have been produced since the 1st of December 1837, not at all distinguishing such tithes as have arisen from titheable matters which were not produced till within the last twenty years; and, in the stating part of the bill, it is not alleged that the titheable matters, in respect of which the tithes are sought, were not produced till within twenty years before the bill was filed; but, on the contrary, it is stated, that, under an act passed in the 8 Geo. 3, Lakenheath Fen was improved, and by the means aforesaid, Lakenheath Fen, which had been previously unproductive, or had produced titheable matters of very inconsiderable value, became fit for cultivation, and that about fifty years ago the lands called Lakenheath Fen were brought into a state of cultivation, and have been since used and cultivated as arable, meadow, and pasture lands, and have produced titheable matters and things of considerable value. Upon this bill, therefore, and the allegations it contains, it cannot, even in the view taken of the subject by the plaintiffs, be contended, that a right of action did not accrue more than twenty years ago. But then the bill, by way of evidence that the lands are not exempted or discharged from the payment of tithes, charges that in 1808 the lessee of the plaintiffs filed a bill against certain occupiers of land, part of Lakenheath Fen, for the tithes of corn, grain, lamb, and wool; that the answer, among other things, stated, that the manor of Lakenheath and rectory of Lakenheath were parcels of the possessions of the monastery of St. Peter and St. Etheldred at Ely; and that Lakenheath Fen was, for the reasons stated in the answer, exonerated from the payment of tithes; and that notwithstanding such defence, an account of the tithes claimed by the bill, was, on the 16th of December 1813, decreed to be taken as against the defendants. Supposing the decree to have established that the lands, which were in the occupation of the defendants to that suit, are even the same lands which are now in the occupation of the defendants to the present suit, and that they were not exempt from the payment of tithes, on the grounds of defence which were relied on in that cause, still there is nothing inconsistent in this plea with that fact. The plea claiming the benefit of the statute is inconsistent with the

allegation, that before the act came into operation, the lands were not exempt from the payment of tithes; and the bill does not allege, that tithes were ever received or accounted for under the decree. The bill further alleges, that, on the 4th of March 1831, the plaintiffs demised the tithes belonging to the rectory of Lakenheath, which, they say, included the tithes claimed, to Hugh Robert Evans; that the lease was subsisting at the time when the act took effect, and was not surrendered till the 31st of December 1837, and it was thereupon argued, that the plaintiffs' right of action did not accrue till that time. But it is not suggested, that the lease was granted with a view to these tithes, or that the lessee paid or received anything on account of these tithes, or that the lessors, previously to the lease being granted, had received anything on account of these tithes. On the bill and the plea together, it seems to me to stand thus—that the plaintiffs being, for anything which appears to the contrary, entitled to the tithes now in question, and having a right to bring an action in respect of them, did, during the twenty years, and without special reference to these particular tithes, but by general words which would have included them, if payable, grant a lease, which was in force at the time the act was passed; and it not appearing that anything was paid or received, or intended to be so, in respect of the tithes now in question, either before the lease was granted or afterwards, I think the existence of that lease does not prevent the operation of the act. Upon the whole, it appears to me, the plea must be allowed; but, having regard to some particular allegations, which are contained in it, the plaintiffs, if they desire, may have leave to amend their bill.

M. R. { THE ATTORNEY GENERAL v.
May 28; { THE MERCHANT VENTURERS'
August 1. { COMPANY.

Charity—Construction of Deed.

In a suit against a corporation to establish certain charitable trusts, an account was directed of the rents of the charity property, from the filing of the information; and an inquiry, whether the corporation had derived

any and what benefit from a certain mortgage transaction ; the costs of all parties to be paid out of the funds.

The information stated, that the Merchant Venturers' Society was established by charter, in the 6th year of King Edward the Sixth. That by an indenture of the 25th day of November 1708, made between Edward Colston, merchant, of the first part, Sir John Duddleston, Bart. and others of the second part, and the Master, Wardens, Assistants, and Commonalty of Merchant Adventurers in the city of Bristol of the third part, certain freehold and copyhold property, and also the manor of Bere, in the county of Somerset, and the manor of Locky, with the appurtenances, were conveyed to the said Sir John Duddleston and others, their heirs and assigns for ever, upon trust from time to time to permit and suffer the Master, Wardens, Assistants, and Commonalty of Merchant Adventurers, and their successors, for ever, to hold and enjoy the said premises, and to grant, renew, and fill up leases of the copyhold estates, or to alter such copyhold estates into leases from time to time, of such tenements and lands as had been usually granted by lease or copy for lives or years, determinable on lives, in such manner as they should think fit, of which the said Sir John Duddleston and others should from time to time stand seised, to the use of such lessees and grantees of copyhold estates as should be granted to them, by virtue of the power thereby given, and to permit and suffer the Merchant Venturers' Society to receive the fines, and likewise the rents, issues, and profits of the said premises, upon the following trusts, (that is to say,) to provide and take care, and permit and suffer the Great House, in St. Augustine's Back, to be for ever thereafter used for fifty poor boys, and one or more schoolmaster or masters, and for necessary servants to inhabit in, and for a school to teach the said boys, and to provide for them in manner therein mentioned, and to place such boys apprentices, and to pay 10*l.* to a master with each boy, when he should be so placed apprentice, and a convenient allowance for such schoolmaster, who might from time to time be displaced at the discretion of the Merchant Venturers' Society, and to keep in repair the said house. And the deed

then stated, that forasmuch as the said Merchant Venturers' Society had computed that the maintenance of the said fifty boys, and of a schoolmaster, and the repairs of the said house, with the allowance for placing each boy apprentice, would amount to 634*l.* 5*s.* per annum, the said Merchant Venturers' Society agreed with the said Edward Colston to accept the same, which should be in the first place taken out of the clear rents and profits of the said premises, as a sufficient allowance for the purposes aforesaid ; and that the surplus of the said manors and premises should be applied towards the payment of such outgoings wherewith the premises were and should be liable unto, and for preventing and avoiding all disputes about the yearly value of the premises ; and to the end that the fund and provision thereby made, should not, on any pretence, be deemed or taken deficient, it was agreed, that inasmuch as the yearly value of the said manors and premises amounted to the value of 720*l.*, the said sum of 634*l.* 5*s.* per annum being deducted therefrom, there would remain the sum of 85*l.* 15*s.*, out of which, all the outgoings to which the said premises should be liable were to be paid ; and the taxes, which were computed to amount to the yearly sum of 62*l.* 14*s.* 8*d.*, were to be paid by the said Edward Colston ; and the outgoings being computed to amount to the yearly sum of 66*l.* 15*s.*, and the same being taken out of the said 85*l.* 15*s.*, there would remain a sum of 19*l.*, which was to be applied to purposes therein mentioned. And it was further agreed, that accounts should be taken for two years, and in case the said sum of 66*l.* 15*s.* for outgoings should not be sufficient, that then what should be wanting, might be supplied by the said Edward Colston and his executors ; and in case the same should be more than sufficient, that then the surplus thereof should be applied to the advantage of the house, by increase of the number of boys, making good contingencies, as therein mentioned ; the accounts to be made up yearly with the said Edward Colston, or his executors, or such others as were therein mentioned. And it was by the said deed further stated, that inasmuch as the monies to be raised by fines on granting and renewing leases and copies, and other casual profits, was in the calculation of 720*l.* included at 100*l.*,

it was agreed that an account should be kept thereof, to be made up once within ten years, and in case they should amount to more than 100*l.* per annum, with the interest of money in the meantime advanced, to make up the said sum of 100*l.* per annum, that then the surplus should remain as a stock to make good any contingencies that might happen to the prejudice of the said manors and lands conveyed, or any deficiency in the outgoings, or otherwise, such accounts to be made up with the nominees and persons appointed by the said Edward Colston, for that purpose, with a provision, that in case of inevitable accidents, whereby the rents should be lessened, or the expenses of repairing augmented, that then the number of poor boys might be lessened, until the losses might be made good, exact accounts thereof to be kept with the visitors; and the said Edward Colston and the Merchant Venturers' Society respectively covenanted with each other, to do and perform the several matters aforesaid. The deed then stated, that whereas the said Edward Colston resolved to add fifty more boys to be maintained in the same manner as the said other fifty boys, and to convey certain fee-farm rents, as a fund for the doing thereof, certain fee-farm rents, amounting to 558*l.* 16*s.* a year, were conveyed by the said Edward Colston to the said Sir John Duddleston and others, their heirs and assigns, upon trust to permit and suffer the said company to receive the rents and profits, upon trust to maintain fifty other boys to be taught and apprenticed, and to provide two ushers or assistants to the said former master, for their teaching the said first fifty boys. And the said company agreed to accept the sum of 553*l.* 5*s.* per annum for the above purposes. And lastly, it was by the said deed stated, that forasmuch as the said fee-farm rents amounted yearly to the sum of 558*l.* 16*s.*, and the said sum of 553*l.* 5*s.* being deducted thereout, the sum of 5*l.* 11*s.* would remain; and as the sum of 15*l.* 11*s.*, the annual expense of a receiver, would sink the said rents 10*l.* per annum; and as there would remain 19*l.* per annum, as a surplus of the revenue appointed for the first fifty boys, it was agreed, that the said 10*l.* per annum should be made good out of the said 19*l.* per annum, and that the remainder should be paid in such way and for such

purposes as therein mentioned. And the said Edward Colston covenanted to pay all such terms as the said rents should be subject to thereafter, or make sufficient provision so as the fee-farm rents should not be burthened, or the charity for the said last fifty boys thereby lessened.

The said Edward Colston afterwards duly made his will, whereby, after reciting the covenants on his part contained in the above deed, he directed the said society yearly and for ever, out of the fee-farm rents, thereby devised to them, to pay 20*l.* per annum to certain preachers, for preaching several sermons, as therein mentioned; and he directed that in case they should have duly performed the covenants contained in the said deed, and it should appear that the said two manors had not let for or produced the yearly sums they had been taken for, and by reason thereof the society had been *bond fide* losers in their own income by the agreement, that then they should appropriate to themselves, out of the remaining part of the fee-farm rents of 39*l.* 17*s.* 6*d.*, thereafter devised, being 11*l.* 17*s.* 6*d.*, so much thereof as should be found to be wanting and necessary to enable them to comply with the said trust, so as they might not be losers thereby; but if the same should not be wanted, that then the whole, or such part as should be overplus, should be applied for the purposes therein mentioned. And the said testator thereby gave to the society the fee-farm rent of 39*l.* 17*s.* 6*d.*, issuing out of the manor of Sharpwicks, in the county of Dorset, for the purposes aforesaid; and also to pay 20*s.* per annum to the minister who should catechize the boys in the house, in order to make up his salary to 10*l.* per annum, and 7*l.* per annum to such persons as should read prayers at such time and in such place as is in the said will particularly mentioned. That after the death of the said Edward Colston, his legal representatives paid to the said society the sum of 3,094*l.* 7*s.* 3*d.*, to secure a provision for the outgoings of the said premises. That part of the estates comprised in the said deed, consisting of an estate in the said manor of Beere, was in the possession of one Edmund Bowyer, at a yearly rent of 315*l.*, and that in pursuance of an arrangement entered into between the said Edmund Bowyer and the society, the manor of Beere, with the appurtenances and the mansion

house of Beere, and such parts of the said manor as was in the possession of the said Edmund Bowyer, by an indenture of lease of the 26th of March 1709, was demised unto the said Edmund Bowyer and Mary his wife, for and during their natural lives, and the life of the survivor of them, at the yearly rent of 315*l.*, payable quarterly; and in further pursuance of the above arrangement, the society, in consideration of 2,500*l.* to be paid to them by the said Edmund Bowyer and Mary his wife, released the said Edmund Bowyer and Mary his wife, and the survivor of them, and the executors and administrators of such survivor, from 310*l.*, part of the said yearly rent of 315*l.* The information then stated, that 500*l.* only was paid by the said Edmund Bowyer to the society, and that the remaining sum of 2,000*l.* was secured to the society by an assignment to them of a mortgage of a lease of the manor of Stogursey, and that in the year 1713, a new lease of the said manor having been granted to them, they had been in possession of, and had treated the said property as their own, and had not given credit to the said charity for any part of the rents and profits thereof, but had applied the same to their own use, and had never given credit for the sum of 2,000*l.* so paid or secured, as before stated. The said information then alleged various breaches of trust, on the part of the society, and prayed an account of the charity property, and that it might be declared, that the manor and lands of Stogursey had been held by the society, in trust for the charity, and that the charity is entitled to all the profits thereof, from "the time the society first entered into possession thereof, or to the whole of the sum of 2,000*l.*, with interest thereon." To this information, the society put in an answer, by which, after setting forth the nature and terms of a negotiation between the said Edward Colston and the society, previously to the date and execution of the deed of 1708, they insisted, that according to the meaning of the parties, and the construction of the said deed, the society were, in fact, purchasers of the manors and premises, and in no way liable to account for the rents, profits, or produce thereof, and bound only in consideration of the conveyance thereof to them, to provide in all future times the annual sum of 720*l.*, for the maintenance of the house, and the several purposes pointed

out by the deed, and to guarantee that such annual sum should be sufficient in all times, and under all circumstances, for such purposes. And they further insisted, that having in each year during the lives of Edmund Bowyer and Mary his wife, and the life of the survivor of them, given credit to Edward Colston, for the whole rent of the manor of Beere, according to the estimated and agreed amount, they were not bound to apply the several sums of 2,000*l.* and 500*l.*, by the purchase-money of the rent of 310*l.*, or either of such sums, or any part thereof, or the interest thereof, to the purposes of the charity.

Mr. Pemberton and *Mr. Blunt*, in support of the information. — The first question raised by the pleadings is, as to the terms and effect of the deed of 1708—whether the society are to be considered as entitled to the property therein contained, subject to the strict charge, for the charitable purposes therein mentioned, or merely as trustees thereof; and the other question is, that whereas many years ago the society released the tenant in possession of certain lands in the manor of Beere, from the payment of the annual sum of 310*l.*, forming part of the yearly rental of 315*l.*, in consideration of the sum of 2,500*l.*, 500*l.* of which was paid to them, and the remainder secured by a transfer of a mortgage for 2,000*l.*, granted to the party to whom the rent was sold, which mortgage was afterwards foreclosed, whereby the society became the owners thereof, in lieu of the 2,000*l.*, whether the mortgaged property vested in them, in trust for the charity, or whether the society are liable to the repayment of the 2,000*l.*, with interest thereon to the charity. Unless there be something in the deed of 1708, by which the words in the habendum are to lose their usual construction, then the conveyance being to the society upon trusts, they must take everything thereby conveyed upon the trusts only, and will not be entitled to any beneficial interest therein, unless there are express words shewing an intention to make them only partial trustees. A contrary intention, however, appears through the whole of the deed; for whenever it is contemplated that there may be an excess above the sum at which the income of the property is estimated, such excess is expressly to be applied for the benefit of the charity, the provision

of the deed being founded upon this, that Colston having made the conveyance, says, "I will pay the taxes, and make good the deficiencies, in case the sum set apart be insufficient for that purpose;" and the society on the other hand shall never say, that because the rents do not amount to the estimated sum, therefore they cannot perform the trusts of the deed, except in certain cases when the society may diminish the number of the objects of the charity. Every contingent advantage to arise from the income of the property, is to be for the benefit of the charity, but the deed does not contemplate any increase of such income. In respect to the mortgage of the manor and lands of Stogursey, we contend, that the charity is entitled to that estate, if it be deemed beneficial, or to the repayment of the 2,000*l.*, with interest thereon; and in case the defendants fail in their defence, they ought to be decreed to pay their own costs.

Mr. Kindersley and *Mr. Osborne*, for the society, contended, that the nature of the agreement, and the true construction of the deed was, that the society would perform the covenants contained in it, on their receiving the rents of the property conveyed to them, as a set-off against their certain expenditure; and that the conveyance to them was as trustees, and not to them immediately as a corporation, to avoid the Statutes of Mortmain; and that they must be considered as the absolute owners of the property, subject only to a trust, by way of security for the performance of their covenants, namely, the maintenance and support of the charitable institution; and consequently that the informant has no right or title to the mortgaged estate of Stogursey, or to any accounts relating thereto.

August 1.—THE MASTER OF THE ROLLS.
—This information prayed that the charity might be established, and that it might be declared that the manor and lands of Stogursey, and the profits thereof from the time the defendants first entered into possession, belong to the charity. The questions in this cause arise on the construction of the deed of 1708, which was duly executed between the parties thereto, after much consideration; and the Attorney General contends, on the other hand, that the society

are trustees only for the benefit of the charity, and bound nevertheless to expend a certain sum annually upon such trusts; whilst, on the other hand, the defendants contend, that the property was conveyed to them for their own use, subject to the trusts specified in the deed. This deed purports to be a contract on the part of the society, to accept and dispose of the trusts therein mentioned, by which the defendants are obliged to execute such trusts at all events; and therefore they claim to be entitled to the property, subject to the performance of the trusts. It is to be observed, that there is no mention in the deed, that any part of the property was to be applied to the use of the society. After comparing the different provisions of the deed, the Master of the Rolls then said, that having regard to the great care taken to prevent any diminution of the income of the property, and the absence of any express stipulation giving the surplus of the property to the society, it appeared to him to be the object of the deed, to establish trusts for the benefit of the charity only; and the deed, being founded on contract, resolved itself into trust, that it might have been worth the while of the company to enter into the contract, which was the result of negotiation; and, at all events, the rents and profits ought to be applied to the benefit of the charity. It appears, that Edward Bowyer, a tenant in possession of a certain estate in the manor of Beere, at the yearly rental of 315*l.*, proposed to the society to pay them the fine of 2,500*l.* for a lease thereof, at the yearly rent of 5*l.* This proposal was agreed to, and the society demised to Bowyer and his wife, for their lives, and the life of the survivor, at a yearly rent of 315*l.*, and afterwards in consideration of 2,500*l.*, to be paid by them to the society, they were released from 310*l.* per annum, part of the 315*l.* yearly rent. It appears, that only 500*l.* of the 2,500*l.* was actually paid, and for the remaining 2,000*l.*, security was given upon the manor of Stogursey, held under Eton College, upon a lease for lives; but Bowyer and his wife were released, and the society were to hold the manor under the college. The society was not entitled to deal in the way they did, for their own benefit; and in making the inquiry, they ought to be charged in account for

2,500*l.*, and to have credit for the rent of 310*l.*, paid or accounted for during the lives of Bowyer and his wife. The account ought not to go back further than the filing of the information.

The declaration he made was, that the whole amount of the rents were applicable to the purposes of the charity; there should be an inquiry whether any and what profit accrued by the transaction with Bowyer, and an account of rents and profits from the time of filing the bill only. The costs of the information on both sides to be paid out of the funds.

Mr. Pemberton believed the charity was well managed, and declined a scheme.

M.R. } PHILANTHROPIC SOCIETY *v.*
March 11.} KEMP.

Legacy—Construction—Marshalling Assets.

A, after directing that her charitable bequests contained in her will should be paid out of her personal estate, then proceeded to charge her leasehold estates, in "addition" to her other personal estate, with and to the payment of her debts, &c. :—Held, in a suit by the charitable legatees, that the amount of the personal estate was not a circumstance to be inquired into, so as to furnish a ground of construction; and that the pure personal estate was not exonerated from the payment of her debts, &c.

The Master, by his report in this cause, found that Anne Sammon, the testatrix in the pleadings mentioned, by her will of the 20th of March 1825, gave and bequeathed to the several legatees therein named, several pecuniary legacies, amounting in the whole to the sum of 3,900*l.*, and amongst others, she gave to the Treasurer of the Philanthropic Society, in Saint George's Fields, the sum of 100*l.*; and she directed, that all her charitable donations and bequests should be paid and satisfied out of her ready money and the proceeds of the sale of her funded property, personal chattels, and effects, and not from the proceeds or by sale of her leasehold or real estates.

And he also found, that the testatrix charged her leasehold estates bequeathed by her will, in addition to her other personal estate, with and to the payment of her debts, funeral and testamentary expenses, and of such of the said several pecuniary legacies and bequests in her will particularly mentioned, and not given to charitable uses. The Master also found, that the testatrix, by a fourth codicil to her said will, charged her freehold estates at Ash and Eastry, which had previously been devised by her, subject to certain charges thereon, unto Thomas Read Kemp, in fee, with and to the payment of the sum of 2,144*l.* 0*s.* 5*d.*, and also all and every such further and other sum and sums of money as she should or might at any time or times thereafter be subject or liable to advance and pay in completing the conveyance, or other assurance thereof to her, which had not then been effected, or otherwise in establishing her right and title thereto, and possession thereof. The cause now coming on to be heard on further directions, the principal question was, whether the testatrix did or did not by the provisions in her will for payment of her charitable legacies manifestly intend that they should be first paid out of her pure personal estate, and whether such estate was or was not primarily applicable to pay them.

It was contended on the part of the plaintiffs, that the testatrix having in one part of her will directed that all her charitable directions and bequests should be paid and satisfied out of her pure personalty, clearly intended to exempt it from all other payments than those so specially charged upon it; and that the Court ought to carry out that intention by giving the pure personalty in the first place to satisfy the charitable legacies; whilst the next-of-kin of the testatrix, and others, insisted that the subsequent clause, by which the testatrix charged her leasehold estates bequeathed by her will, in addition to her other personal estate, with payment of her debts and other legacies, rebutted that presumption; and that the personal estate, being the natural fund for payment of debts, could not be exonerated but by express words.

Mr. Pemberton and *Mr. Ellison* for the plaintiffs.

Mr. Tinney, Mr. Colville, and Mr. Teed,
for other parties.

The following cases were cited :—

House v. Chapman, 4 Ves. 547.
Roberts v. Walker, 1 Russ. & Myl. 759.
The Attorney General v. Winchelsea, 8
Bro. C.C. 374.
Bootle v. Blundell, 1 Mer. 224.

THE MASTER OF THE ROLLS.—The testatrix, after directing the payment of her charitable legacies out of her pure personal estate, then gives a direction for payment of her debts and legacies, which precludes the notice of an intention to exonerate her pure personal estate from all other charges in favour of her charitable legacies ; for by a subsequent part of her will, she has charged all her leasehold estates, in addition, and not in priority, to her other personal estate, with the payment of her debts and other pecuniary legacies. This she has constituted a fund consisting partly of pure personalty, and partly of personalty affected with realty ; and the question is, whether the charitable legacies are to be paid out of the pure personalty freed from debts and other legacies, or whether you must have *pro rata* division out of the several different sorts of personalty, in which case the charitable legacies are to be paid out of the surplus only of the pure personal estate. There may have been pure personalty, but here is residue consisting of personal estate affected with realty and pure personalty. You cannot inquire into the amount of the personal estate, or construe the will on the accounts now taken, but the intention of the testatrix is to be gathered from the words of the will itself. And if in the distribution of the estate you have a direction that one fund is to be added to another, how can you adopt this, if you take out so much as will satisfy the charitable legacies ? No doubt the testatrix intended that the charitable legacies should be paid in full ; and if this were a matter independent of authorities, I might be inclined to make a decree for the marshalling of the assets of the testatrix. It must be referred to the Master to compute the respective values of the different funds which are thus blended by the testator into one common fund.

V.C. } ATTORNEY GENERAL v. GLADSTONE.
June 10. }

Legacy—Charity.

Bequest of a legacy to A. B. to be applied for the use of Roman Catholic priests in and near London, at his absolute discretion. Objected, that the bequest was not charitable ; that A. B. having died before the testator, the legacy lapsed ; that it was void for uncertainty :—Held to be a legacy for the benefit of those persons who should now and hereafter fill the character of Roman Catholic priests in and near London. Referred to the Master to approve of a scheme.

Charles Robert Blundell, Esq., by his will, dated the 28th of November 1834, gave and bequeathed, out of his personal estate, the following legacies : To the Right Rev. Dr. Walsh, of Wolverhampton, the sum of 5,000*l.*, to be by him applied for the purpose of Oscott College, in Staffordshire ; to the Rev. Thomas Robinson, of Liverpool, 4,000*l.*, to be by him applied to the use of Ampleforth College, in Yorkshire ; to the said Thomas Robinson the further sum of 4,000*l.*, to be by him applied to the use of Old Hall Green College, in Hertfordshire. The testator then gave to the said Thomas Robinson the further sum of 15,000*l.*, to be by him applied for the use of Roman Catholic priests in and near London, at his absolute discretion ; all which legacies he directed to be paid, immediately after his decease, out of his personal estate. And he bequeathed all the residue of his personal estate to the Rev. Dr. Bramston and the Rev. Dr. Walsh, their executors, administrators, and assigns, absolutely. The testator appointed John Gladstone, Robert Gladstone, and Thomas Robinson, executors of his will. John Gladstone alone proved the will. The Rev. Dr. Bramston and the Rev. Thomas Robinson died during the life of the testator.

The information was filed by the Attorney General under this charitable bequest, at the relation of several Roman Catholic priests resident in and about London, against the executor, John Gladstone, and Dr. Walsh, the residuary legatee ; and it prayed, that the charitable use, for the benefit of Roman Catholic clergy in and near London, might be established ; and that the legacy might

be invested and secured under the direction of the Court; and that, if necessary, it might be referred to the Master, to settle a scheme for regulating such charitable legacy.

The Rev. Thomas Walsh, by his answer, admitted this to be a charitable legacy, but submitted, whether, by the death of the said Thomas Robinson in the life of the testator, the said legacy of 15,000*l.* did or not lapse, or did or not fail; or whether, regard being had to the said testator's direction that the same should be applied at the absolute discretion of the said Thomas Robinson, the said charitable use did or not remain or continue, or was or not then in full force and virtue for the benefit of the Catholic clergy in and near London, as the Court should direct.

Mr. Bethell and *Mr. Campbell*, in support of the information, cited—

Attorney General v. Guise, 2 Vern. 266.

Loyd v. Spillet, 3 P. Wms. 344.

Attorney General v. Cock, 2 Ves. sen. 273.

Grieves v. Case, 1 Ves. jun. 548.

Attorney General v. Comber, 2 Sim. & Stu. 93.

Attorney General v. Bishop of Chester, 1 Bro. C.C. 444.

Brodie v. Chandos, note to *Attorney General v. Bishop of Chester*.

De Costa v. De Pas, Amb. 228.

Mr. Rolt, for the executor, *Mr. Gladstone*.

Mr. Purvis and *Mr. Bagshawe*, for Dr. Walsh, the residuary legatee, contended, that the bequest was void for uncertainty; and that it would be impossible to decide what was the meaning of "in and about London." They also submitted, that the words here used could not be considered sufficient to constitute a charitable bequest, the legacy not being given to poor priests.

Mr. Bethell replied.

THE VICE CHANCELLOR.—It appears to me, looking at the language of this will, that the legacy is given for the benefit of those persons who may at any time bear the character of Roman Catholic priests in and near London. No objection arises as to the manner of disposing of the charity, because when once it is decided that a charitable

bequest exists, the Court will solve the difficulty of distributing it, by sending a scheme to the Master.—[His Honour then read the portion of the will already recited, and continued]—The expression which the testator uniformly adopts in giving each of the legacies to the different colleges, is, "to be by him applied for the purpose of, or for the use of," each particular college—clearly meaning to give for the benefit of some object which would continue. Then he makes the bequest for the benefit of the Roman Catholic priests in and near London, using the same words as he did when the colleges were the objects of his bounty. Now, I think this is a gift as well for the benefit of those living at the time of his death, as those who might come into *esse* afterwards: and as we know the fact that there will always be Roman Catholic priests, it follows, that there will always be objects to answer the bounty. In a subsequent part of the will, where the testator gives a legacy to a particular priest, he points it out clearly, and uses very different language. He says, "To the person who should be incumbent of the parish of Hornby at my death;" so that where he intended to give a personal benefit, he has marked it as such. I think, upon the whole, that this is a legacy for the benefit of those persons who should now and hereafter fill the character of Roman Catholic priests in and near London. A reference must be made to the Master, to approve of a scheme.

V.C. { COMMISSIONERS OF CHARITABLE DONATIONS v. DEVE-
June 23, 30. { REUX.

Legacy Duty—Foreign Domicile.

A British subject went to reside in France in 1776, where he obtained letters of naturalization, and purchased lands. In 1791, he was obliged to quit the country, and his property was confiscated; he then came to England, and remained here till 1802, when he returned to France, and claimed the compensation for his lands. By his will, which confirmed a previous will made in England, he gave part of his property, including the expected compensation, to an Irish charity:—Held, that the testator being domiciled in France, and the property being in its essence

French, and left by a will made in France, no legacy duty was payable upon the charitable bequest.

This case came on upon the petition of the Commissioners of Charitable Donations and Bequests in Ireland, which stated, that James Fanning was a native of Waterford, in Ireland: that soon after the peace of Fontainebleau, which took place in 1762, James Fanning went to reside, and took up his permanent abode and residence in France, and in the year 1776 he obtained letters of naturalization and nobility in France, by virtue of which letters, he assumed and used the style and title of Jacques Comte de Fanning, and his wife was designated by and used the style and title of Lady Françoise Butler, wife of Lord Jacques de Fanning, and that the said J. Fanning was to all intents and purposes domiciled in France: that in April 1777, J. Fanning purchased and became the owner and proprietor of an extensive property called the Fiefs Lands and Seignories of La Roche Talbot, situated in that part of France comprised in the Department of the Sarthe and La Mayenne: that in 1778, there was again war between England and France, which was continued till 1783, when the same was terminated by the Peace of Versailles, and that in 1789 the Great Revolution broke out in France, but that notwithstanding such war and revolution, J. Fanning continued to reside in France until the year 1791; that in 1791, in consequence of the persecutions during the revolution, J. Fanning, in common with others, withdrew from France, and came over to England; shortly afterwards, the French government ordered the property of all French subjects who had emigrated from France, to be sequestered; the property of James Fanning was, under this order, sequestered, and afterwards confiscated and sold: that James Fanning remained in this country till October 1803; in January 1802, he made a will while lodging in London; after this, a law was passed in France, allowing French emigrants to return to France, whereupon James Fanning returned to France, and made various applications for the recovery of his property: that in September 1804, James Fanning, being then still residing in France, made his second will, which commenced thus:—"I, James

Fanning, born in the city of Waterford, in the kingdom of Ireland, have made my will in London, in the month of January 1802, and deposited it in the hands of my esteemed friend Mr. Edward Christian, at his house, No. 218, High Holborn, London, and this deposition took place before my departure thence for this country, whither I come to claim the restitution of the acquisition I had made in it, of the lands of La Roche Talbot, and its dependencies, and which I expected would have been without difficulty restored to me."—"The copy of my last will, as set forth in my testament, is probably mislaid, as I cannot find it; I therefore mention in this writing, the principal articles contained in it, not doubting that my property in this country will be restored to me, or that I shall receive a just indemnity for it." The testator then left part of his property in the following terms:—"I bequeath one-third part of my said property for charitable uses, for the relief of the poor of the city of Waterford, except one-tenth part, which I desire may be given or laid out for the relief of the poor of the parishes of Suffaney, Ballygory, and Windyhouse, and the parishes of Castlebanny and Roches Town." The testator, after confirming his previous will in every respect, except as to the nomination of one of his executors, appointed the Rev. Dr. Walsh and James Edward Devereux executors of his said will.

The testator died in Paris on the 2nd of August 1806, and his will was proved by James Edward Devereux alone, in France, and also in the Prerogative Court of the Archbishop of Canterbury.

The petition then stated, that the testator had resided in France entirely from the date of his return unto his death; that under a convention between the Kings of England and France, relative to the liquidation of the claims of English subjects against the French government, on account of lands confiscated during the revolution, certain commissioners were appointed to investigate and determine upon the sum due to each British subject, for the loss suffered by such confiscation; that the said commissioners, by their award, made in the year 1820, awarded the sum of 41,993 francs rentes for the immoveable property of the said James Fanning, and 468 francs for the value of moveable property, and 7,151 francs for

timber cut down; that various sums amounting to 55 per cent. on these several sums, were then transferred by the commissioners to Daniel Reardon, as agent for James Edward Devereux; that the Commissioners of Charitable Donations filed this bill in July 1822, for an account of the monies so awarded by the commissioners in respect of the said confiscation. That by an order in the cause, made in August 1841, it was directed that the sum of 25,143*l.* 14*s.* 8*d.* should be transferred to the petitioners, in respect of such monies so awarded, and that the sum of 4,000*l.*, residue of the sum so awarded, being the whole sum to which the petitioners were entitled, should be set apart to answer the claim made by the Legacy Duty Office, in respect of the legacy duty upon the said bequest.

The petitioners then stated that they were advised that no legacy duty was payable in respect of the said charitable bequest; they therefore prayed that the said sum of 4,000*l.*, with the dividends which had become due, might be transferred and paid over to them.

Mr. Bethell and *Mr. Faber*, in support of the petition, contended, that the testator, the Comte de Fanning, was clearly domiciled in France; that he had never lost that domicile, and that in consequence, no legacy duty was payable upon the charitable donation made by him, of property which was in fact French, and disposed of by a will made in France. The testator was an Irishman by birth; he then went to reside in France, and procured letters of naturalization there; he afterwards purchased property in that country. The revolution, however, having prevented him from remaining any longer, and his property having been confiscated, he came to England, and remained here till 1802. During that visit to this country, the French government proclaimed that the emigrants might return, upon which the testator did return, but he clearly never lost his French domicile, and no legacy duty attaches upon any property left by a domiciled foreigner. Legacy duty was originally imposed as a tax upon the money passing from the executor to the legatee. An executor who pays money in this country, must take the discharge rendered necessary in this country; in such a case, there would be a legacy stamp. The decisions in *The*

Attorney General v. Jackson (1) and *The Attorney General v. Forbes* (2), go to this point; also *Logan v. Fairlie* (3). Wherever the person is domiciled, the law of the country in which he dies takes effect — *In re Bruce* (4). Here, the testator went to France, and made that the seat of his fortunes as long ago as 1777; though he was domiciled there, he was originally born in Ireland, where a different duty attaches, and there would seem to be no reason why the testator should be considered a domiciled Englishman more than a domiciled Irishman.

In re Ewin, 1 Cr. & Jer. 151; s. c. 9 Law J. Rep. Exch. 37.

The Attorney General v. Jackson, 8 Bligh, 15.

The Attorney General v. Forbes, 2 Cl. & Fin. 48.

Logan v. Fairlie, 1 Myl. & Cr. 59; s. c. 2 Sim. & Stu. 284; 3 Law J. Rep. Chan. 152.

Re Bruce, 2 Cr. & Jer. 436; s. c. 1 Law J. Rep. (n.s.) Exch. 153.

Munroe v. Douglas, 5 Mad. 379.

Bempde v. Johnstone, 3 Ves. 198.

Somerville v. Somerville, 5 Ibid. 750.

The Attorney General v. Cockerell, 1 Price, 165.

The Attorney General v. Beatson, 7 Price, 560.

The Attorney General v. Dimond, 1 Cr. & Jer. 356; s. c. 9 Law J. Rep. Exch. 90.

The Attorney General v. Hope, 4 Tyr. 878.

Pearse v. Pearse, 9 Sim. 430.

The Attorney General, and *Mr. Romilly*, contra, argued, that an Englishman could, under no circumstances, acquire a domicile in a foreign country, so as to avoid the English legacy duty. That a British subject might change his liability to the amount of duty, upon going to different parts of the Queen's dominions, but could not, by going to a foreign country, get rid of it altogether, and that the word "domicile" had, in fact, no meaning as regarded an Englishman, for no length of residence by an English-

(1) 8 Bligh, 15.

(2) 2 Cl. & Fin. 48.

(3) 1 Myl. & Cr. 59.

(4) 2 Cr. & Jer. 436; s. c. 1 Law J. Rep. (n.s.) Exch. 153.

man abroad, could give him a domicile anywhere away from the dominions of the Queen: that domicile depended upon an intention permanently to reside abroad, and if the testator really were domiciled in France, he was not any longer subject to pay the legacy duty of this country; but here, the testator shewed that he intended to return to this country, and was not entirely resident in France, for in his will he made use of the expression, "I made my will in London, before my departure thence for this country, whither I come to claim the restitution of the acquisition I had made in it of certain lands," &c. He clearly had been domiciled in France, but he had lost his domicile there, and had acquired a domicile in this country, by residing here after he was compelled to quit France, and it was clearly his intention, in returning to France, to do no more than recover the property which had been taken from him, and then to return here again.

Hill v. Reardon, 2 Russ. 608.

Arnold v. Arnold, 2 Myl. & K. 365;
s. c. 4 Law J. Rep. (N.S.) Ch. 79, 123.

In re Franklin, 3 Sim. 147.

In re Wilkinson, 1 Cr. M. & R. 142;
s. c. 3 Law J. Rep. (N.S.) Exch. 236.

Mr. Bethell, in reply.

THE VICE CHANCELLOR.—I have read the affidavits in this case, and no doubt is left in my mind, that the Comte de Fanning was domiciled in France at the time of his death. This case appears to be concluded by the case of *In re Bruce*. The question here seems to be, not to whom the party owed allegiance, but where he was domiciled at his death, and there can be no doubt, but that he was domiciled in France; his will also was French, and the property to be administered was in its essence and origin French, and though the title to it arises out of British allegiance, that does not affect the question. There was a fund set apart by the French government to answer the demand for compensation made by the English subjects, in proportion to their loss. There is no difficulty whatever in the case, the domicile of the party being French, the will French, and the property French. Therefore, I am of opinion, that the legacy duty is not payable.

V.C. }
July 12. } SILVESTER v. BRADLEY.

Devise—Timber—Severance from Freehold.

A testator gave his estates to trustees for his son for life, and afterwards for his son's children, and in default of issue, for others in remainder, and directed that the timber on his estates should be used for repairing houses, and for the advantage of the estate, or that it should be sold, and the produce be applied as personal estate:—Held, upon bill for specific performance, that this trust did not operate as a perpetual severance of the timber from the estate, but that it became void after the first adult person came into possession of the estate.

This suit was instituted to compel the specific performance of a contract for the purchase by the defendants of a certain estate in the county of Kent, at the sum of 17,500*l.*, including the timber and underwood on such estate.

The cause now came on upon a demurrer, for the purpose of obtaining the opinion of the Court upon the construction of the will of a testator named William Marshall, who gave all his real estates whatsoever to trustees, upon trust for his son, Thomas Marshall, and his assigns, for life; and after his death, in trust for the children of his son; and in default of issue, in trust for his brother for life, and then for his brother's children; with divers remainders over in default of issue.

The will, amongst other things, contained this clause:—"I direct that the timber or wood which shall be upon my real estates, or any of them, shall from time to time be made use of for repairing houses thereupon, or otherwise for the benefit and advantage of my estate, or that the same shall be sold, and that the money arising from the sale thereof shall be applied in the manner in which my personal estate is hereinbefore directed to be applied."

The defendants, the intended purchasers, alleged, that as the direction in the testator's will, as to the timber or wood upon the devised estates, was not, in express terms, confined to any limited period, such trust operated in equity as a perpetual severance

of such timber or wood from the said estates; and that the persons entitled to the testator's residuary estate would, in all perpetuity, be entitled to so much of such timber or wood as should not from time to time be made use of for repairing houses upon the said devised estate or otherwise for the benefit of the estates, or to the proceeds of the sale thereof.

The plaintiffs insisted, that such objection was altogether without foundation; and that the trust in the testator's will as to timber or wood, had long since determined; but that if the same was intended to continue for ever, it was void in law: and the plaintiffs therefore submitted, that the defendants ought to be compelled specifically to perform their contract.

Mr. Wakefield and Mr. Hall, for the plaintiffs, cited *Butler v. Borton* (1).

Mr. Richards and Mr. Faber, for the purchasers, cited *Stanley v. White* (2).

The VICE CHANCELLOR was of opinion, that the trust for cutting down timber had ceased. The first tenant for life was dead, and the inheritance had become vested in one of the tenants in tail in remainder, who was to take in case of failure of issue of the testator's youngest son. His Honour was of opinion, that the trust as to timber ceased as soon as the first estate of inheritance became vested in an adult person. The case of *Butler v. Borton*, as reported, fell short of what it really was; but there was nothing in it to prevent him from saying that this trust had ceased.

V.C. }
July 12. } GIBBON v. STRATHMORE.

Demurrer to Interrogatory—Solicitor.

An interrogatory being put to a solicitor in the cause, as to whether the plaintiff had acted as adviser and agent for a certain defendant, the solicitor demurred, for that he had acted professionally for both parties and in the suit; and all the information he possessed which would enable him to answer the interrogatory, had been derived from commu-

nications confidentially made to him by the said defendant and the plaintiff, or one of them; and he considered his answering the interrogatory would be a breach of professional confidence reposed in him by his clients. Demurrer allowed.

This cause came on upon the demurrer of Mr. Western (solicitor for the defendant) to the ninth interrogatory, which was, "Whether or no, as you know, or for any and what reason believe, has the said plaintiff, Alexander Gibbon, at any and what times or time, since the death of George Thomas Lyon Bowes Lord Glamis, deceased, in the pleadings of this cause mentioned, in any and what manner acted as, and whether or not been, the adviser, and whether or not the agent of the above-named defendant, Lady Glamis, in and about, or relating to the estate or the affairs of the said Lord Glamis, or any and which of them; and whether or not in or about compounding, satisfying, or paying the debt, or any and what debts, due or claimed to be due from the estate of the said Lord Glamis; and whether or no in or about buying up the charges or incumbrances, or any and what charges or incumbrances, upon his estate, or any and what estates or estate, in which the said Lord Glamis was interested. Whether or no, as you know, or for any and what reason believe, is the said Alexander Gibbon still the adviser, and whether or no the agent of the said Lady Glamis, in and about or relating to the estate of the said Lord Glamis," &c.

Demurrer to the ninth interrogatory—"I demur thereto, and for cause of demurrer say, I have been employed professionally as solicitor by Lady Glamis and Alexander Gibbon in and about various matters connected with Lord Glamis's property and affairs, and in this suit. All the information I possess, which would enable me to answer this interrogatory, has been derived from communications confidentially made to me by the said Lady Glamis and Alexander Gibbon, or one of them, as their solicitor. I consider my answering this interrogatory would be a breach of professional confidence reposed in me by my clients."

Mr. Lovat, in support of this demurrer, cited—

(1) 5 Mad. 40.

(2) 14 East, 332.

Phillipps on Evidence, 5th edit., vol. 1, p. 190.

Cromack v. Heathcote, 2 Brod. & Bing. 4.

Greenough v. Gaskell, 1 Myl. & K. 98.

Mynn v. Joliffe, 1 Moo. & Rob. 326.

The King v. Withers, 2 Campb. 578.

Mr. Richards and Mr. Montague, contra.

—This demurrer cannot be allowed. The witness is not protected. He states, that his information in the suit has been derived from Lady Glamis and Alexander Gibbon, or one of them. This leaves it in doubt whether he received the information from one or the other. It is quite consistent with the demurrer, that he should have information not obtained either from Lady Glamis or Alexander Gibbon. He ought to state everything which has taken place not in confidential communication—*Parkhurst v. Lowten* (1). The witness does not say he cannot reply to any particular part of the interrogatory, but he refuses to answer any. If an answer were put in in this shape, it would clearly be exceptionable. By the late cases upon this subject, it is laid down, that if the communication is not made with a view to legal advice, it is not protected.

Desborough v. Rawlins, 3 Myl. & Cr. 515; s. c. 7 Law J. Rep. (N.S.) Ch. 171.

The VICE CHANCELLOR.—It appears to me, that this is a very clear case. If you only take the words of the witness in their common sense, it shews that he cannot answer this interrogatory. He says, all the information he possesses has been derived from communications confidentially made to him. I think that language is sufficient; for it means, that everything with which his mind is impregnated regarding the suit has been derived from communications confidentially made. I must take the words, in common sense, to signify, that the communications were made for such purpose as confidential statements would be made. The second objection raised, as to the words, "by Lady Glamis and Alexander Gibbon, or one of them," has nothing in it. The witness need not distinguish from whom he got the information: what is stated appears to me quite sufficient. Then the witness says, that he

considers his answering the interrogatory would be a breach of professional confidence; and it has been said, he should not have given his opinion: but really I think, to a certain extent, he is the person most competent to form an opinion upon that question. Upon the whole, I am of opinion, that the witness has stated a sufficient case to protect him from answering. The demurrer must, therefore, be allowed.

Decree—The usual order upon allowing a demurrer by a witness.

V.C. }
July 18. } YOUNG v. LORD WATERPARK.

Settlement—Charge—Interest.

Under a power of distributive appointment in a marriage settlement, the whole fund applicable for that purpose is appointed to four out of seven younger children, to the exclusion of the remaining three. On a bill filed by the personal representative of two of such excluded children deceased,—Held, that two-sevenths of the residue of the whole fund, after the first three appointments, was still a charge upon the settled premises, and to be raised thereout, with interest at 5l. per cent. from the date of the death of the setilor in whom the power was vested.

By indentures of settlement, bearing date the 10th and 11th of August 1757, made in contemplation of the marriage of Sir Henry Cavendish with Sarah Bradshaw, afterwards Baroness Waterpark, certain lands in Essex, and in the counties of Tipperary and Cork, in Ireland, were limited to the use of Sir Henry Cavendish for life, with remainder to trustees to preserve contingent remainders, with a jointure of 1,000*l.* to the said Sarah Bradshaw for life, and a term of 500 years limited to trustees to support such jointure, with remainder to the first son of the said Sir Henry Cavendish and Sarah Bradshaw, in tail male, with remainders over; and the said trustees had a power of raising 10,000*l.*, for portions for daughters and younger children of the marriage, in the usual manner; in case there should be only one younger child, such child to be entitled to the whole sum of 10,000*l.* The settlement then proceeded in these words:—"And in

Balfour & Cooper
52 L & Ch 498

(1) 2 Swanst. 201.

case there should be two or more such younger children, the said sum shall be paid and *distributed amongst them*, in such shares and proportions as the said Sir Henry Cavendish and Sarah his wife, and the survivor of them, by any deed or writing, by them, or the survivor of them, to be duly executed in the presence of two or more credible witnesses, shall direct or appoint, and for want of such appointment, then the said sum of 10,000*l.* to be equally divided among such younger children, share and share alike," the shares to be paid to sons at twenty-one, and to daughters at twenty-one or marriage, with benefit of survivorship. There were eight children of the marriage, seven of whom being younger children, were interested in the appointment of the 10,000*l.* On the 28th of November 1783, a deed of appointment was executed by Sir Henry Cavendish and Sarah his wife, in pursuance of their power, whereby they appointed 2,000*l.*, part of the said 10,000*l.*, to Sarah Countess of Mountmorris, one of the daughters of the marriage. Two further sums of 2,000*l.* and 3,000*l.* were subsequently appointed, the one to a daughter and the other to a son; and on the 10th of February 1803, 3,000*l.*, the residue of the said sum of 10,000*l.*, so settled as aforesaid, was appointed to a younger son, in exclusion of the remaining younger son and two daughters, in favour of whom no appointment whatever had been made.

Sir Henry Cavendish died in August 1804, and his wife, then Baroness Waterpark, died in August 1807. The Baroness de Ville, one of the daughters, to whom no share had been appointed, died in 1802, having made a will, but appointed no executor; and letters of administration to her estate were taken out by her daughter H. J. Maria de Lossey in 1829.

On the 23rd of January 1830, a bill was filed by the said H. J. Maria de Lossey and her husband, against Baron Waterpark, the eldest son of the marriage, and the two younger children, to whom no appointments had been made, praying that the share to which the Baroness de Ville was entitled under the settlement, might be raised and paid to the plaintiffs, as her personal representatives. The bill was several times amended, and certain mortgagees and their trustees, in whose possession the original

deed of settlement was, were made parties. The eldest son put in his answer, stating that he had joined with his father in suffering a recovery of the estates settled, and had actually raised and paid 7,000*l.* out of the 10,000*l.*, so appointed as aforesaid, but 3,000*l.* still remained to be raised. All the other defendants appeared and put in their answers, stating the mortgages, and admitting the statements in the bill, and placing themselves under the protection of the Court. In 1832, two of the defendants, a younger son and daughter, to whom no share had been appointed, died, and letters of administration were taken out to their estates, by Samuel Young, the present plaintiff, who discovering that the suit instituted by H. J. Maria de Lossey, had been compromised for 1,000*l.* and costs, paid on the 22nd of June 1838, filed his bill against the same parties, stating the above facts, and praying that the shares of the two younger children, whom he represented, might be raised and paid to him. Baron Waterpark put in an answer to this bill, admitting the allegations in general, but setting up the provisions of the late act for the limitation of actions and suits (1), against the claims of the plaintiff, and demurred to his bill. His Honour the Vice Chancellor overruled the demurrer, upon the ground, that upon the face of the bill itself the case was not within the statute. The cause now came on for argument.

Mr. Richards and *Mr. Shadwell*, for the plaintiffs.

Spencer v. Spencer, 5 Ves. 362.

Wilson v. Piggott, 2 Ves. jun. 351.

Butcher v. Butcher, 1 Ves. & Bea. 79, per Lord Eldon.

Vanderzee v. Aclom, 4 Ves. 771.

11 Geo. 4. & 1 Will. 4, statute on illusory appointments.

Mr. Stuart and *Mr. Law*, for Lord Waterpark.—*Ex parte Hasell*, 3 You. & Col. 617.

Mr. Stinton, for Lady Mountmorris.

Mr. Koe, for George Cavendish.

Mr. Richards, in reply.

THE VICE CHANCELLOR.—As I understand the law, this is a very clear point. The first three appointments made were good; there is no question but they were properly

(1) 3 & 4 Will. 4. c. 27. s. 40.

made. Then the sum of 3,000*l.* became liable to be appointed amongst the children, or to go to them equally in default of appointment. It was then appointed to one child, which was clearly not a good appointment. The rule of law, I take to be, that where all the objects of a power are named in the appointment of the whole fund, or in collective appointments, which together shall exhaust the whole fund, such appointment is good, but it must include all the objects of the power; therefore, this last appointment being made to one only, it was bad. I apprehend that the plaintiff, who represents two of those objects, to whom nothing was given, is entitled to two-sevenths, in virtue of his representing two of the children. As to the other parties, no question arises. For aught I know, the transaction might have been such as to preclude them from any right to payment of the 3,000*l.* It is, I think, most likely to satisfy the justice of the case, to declare that two-sevenths of the 3,000*l.*, part of the principal sum of 10,000*l.*, is still a charge on the hereditaments, and to be raised out of the premises, with interest after the rate of 5*l.* per cent., from August 1804. The plaintiff to pay Lady Mountmorris's costs, and these must go with the costs of the plaintiff; and the other defendants to be paid by Lady Waterpark, or raised out of the estate.

K. BRUCE, V.C. }
Jan. 18, 26; } BURRIDGE v. ROW.
May 31. }

Policy of Assurance—Set-off—Trust.

A, entitled to a policy of assurance on a life, declined to keep up the policy. *W.* voluntarily, and without any contract with *A*, paid the premiums:—Held, that the only right acquired by *W.* was the right of repayment, with or without interest, of the sums paid by him, and that, subject thereto, the proceeds of the policy on the falling in of the life belonged to *A*.

W., the father of *S*, the intended wife, on the marriage of *S*, gave a bond to the trustees of the marriage settlement, conditioned for the payment of 5,000*l.* at his death. *R.*, the intended husband of *S*, covenanted with the trustees to pay to them 5,000*l.* after his

death, and assigned to them policies of assurance for 5,000*l.*, with a declaration that the sums received in respect of the policy, if they amounted to 5,000*l.*, were to be considered as a satisfaction of the covenant. The trusts of this 5,000*l.*, the subject of the covenant, were (in the events that happened) for *S.* for life, with remainder to *R.* *R.*, after the marriage, became bankrupt, and the trustees proved, as a debt against his estate, for the value of his covenant, and the sum received in respect thereof produced 431*l.* stock, which was invested in their names. The assignees of *R.* assigned to *W.* all the interest of *R.* under the settlement, whether in the 431*l.* or the policy fund. *R.* died, and 5,991*l.* stock, the produce of the policies, was invested in the names of trustees. *W.* became bankrupt, and died:—Held, that the trustees of the settlement were entitled to hold the two sums of 431*l.* and 5,991*l.* against the assignees of *W.* towards satisfaction of the bond of *W.*

Alderman Winchester, on the occasion of the marriage of his daughter Sarah with William Row, gave a bond to Skinner Row and Thomas Briggs, conditioned for the payment of 5,000*l.* within three months after his decease, with interest for the same in the meanwhile, from the date of the bond, at 5*l.* per cent.

By the marriage settlement of Mr. and Mrs. Row, dated in November 1825, the trusts of the money conditioned to be paid by the bond were declared to be for Sarah for life, for her separate use, with remainder to William Row for life, with remainder to the children of the marriage, with an ultimate trust, in default of children, for Sarah absolutely.

By this settlement, William Row covenanted to pay the trustees, Skinner Row and Briggs, 5,000*l.*, within six months after his decease, upon the trusts thereafter declared. He also assigned two policies of assurance on his own life for 2,000*l.*, and 3,000*l.* to the trustees; and it was by the indenture declared that the trustees should, after the death of Row, call in the said sums of 2,000*l.* and 3,000*l.*, and every other sum payable by virtue of the said policies, and out of the monies to arise thereby, retain 5,000*l.* in satisfaction of the covenant, and should invest the said sum of 5,000*l.*, and

such further or other sums, upon the trusts thereafter declared. The trusts of the 5,000*l.*, and of such further or other sums, were declared to be for Sarah for life, for her separate use, with remainder to the children of the marriage, with an ultimate trust, in default of children, for William Row. The settlement also contained a covenant on the part of William Row to keep up the policies.

In 1828, William Row became bankrupt. The trustees were allowed to prove in the bankruptcy for the value of Rowe's covenant to pay the 5,000*l.* within three months after his decease. This value was fixed at 1,625*l.*, and the dividend received in respect of it was invested in the purchase of 431*l.*, 3*l.* per cent. consols, in the names of the trustees.

The assignees declined to keep up the policies, as also did the trustees of the settlement. The policies were kept up, but how did not clearly appear. It was alleged by the defendants that Alderman Winchester had, with his own monies, kept them up; by the plaintiffs, that they had been kept up out of the interest of the 5,000*l.*, for which he had given his bond, and which interest had been made payable to Mrs. Row for her separate use. Upon these conflicting statements, his Honour observed, that it might be assumed for the purposes of the argument that the premiums were paid by Alderman Winchester, with his own monies, for the purpose of obtaining the absolute property in the policies.

By an indenture, dated the 5th of January 1832, and made between Row's assignees and Alderman Winchester, after reciting the above facts, and that Alderman Winchester had contracted with the assignees for the sale to him "of all the bankrupt's interest, reversion, and expectancy of and in the said sums of 5,000*l.* and 5,000*l.* under and by virtue of the said indenture of settlement, and all benefit and advantage thereof," at the price of 100*l.*, it was witnessed, that the assignees assigned to Alderman Winchester all the reversion, interest, and expectancy of the bankrupt in the 5,000*l.* secured by the bond, and "also the said sum of 5,000*l.* so secured to be paid to the trustees under the said indenture of settlement by the heirs, executors, and administrators of the bankrupt, within six months

after his decease, and which had been so valued, and on which the said dividend had been so received and invested as aforesaid," to hold to the said Winchester "in as full, ample, and beneficial manner as William Row, by virtue of the settlement, might have held the same in case he had not become bankrupt."

In March 1832, Row died.

There was no issue of the marriage.

The sums secured by the policy, and a bonus thereon, were received from the offices, and invested in the purchase of 5,992*l.*, 3*l.* per cent. consols, in the names of the trustees, with the privity of Alderman Winchester.

In February 1838, Alderman Winchester became bankrupt, and died a month after. The sum conditioned by his bond to be paid had not been paid.

After the death of William Row, Mrs. Row married Mr. Burrige, the plaintiff.

The bill was filed by Mr. and Mrs. Burrige against Winchester's assignees and the trustees of the settlement, for the purpose of deciding the rights of the parties to these sums of stock. Row's assignees were not made parties.

In the discussion on the hearing, the following questions arose:—First, to whom did the 5,992*l.* consols belong? Assuming that the 5,992*l.* consols were subject to the trusts of the settlement, this fund, in the events that had happened, would be held by the trustees on trust for Mrs. Burrige for life, with remainder to Alderman Winchester absolutely. The question would then arise, whether the trustees would be entitled to hold the reversion to which Alderman Winchester had become entitled in this stock, in respect of the 5,000*l.* due from his estate by virtue of his bond. Secondly, to whom the 431*l.* consols belonged.

Mr. Simpkinson, Mr. Russell, and Mr. Wetherell, for the plaintiffs.—First, subject to the repayment to Winchester's assignees of such sums, if any, as Winchester has paid in respect of the premises, this fund is subject to the trusts of the settlement. Secondly, the trustees are entitled to hold this sum of 5,992*l.* until the sum of 5,000*l.* secured by Alderman Winchester's bond has been paid. Where A. covenants for the payment of a sum to B, and any property belonging to A. comes legitimately

into the hands of B, he has a right to retain it until A. has performed his covenant.

Jeffs v. Wood, 2 P. Wms. 128.

Corsbie v. Free, 1 Cr. & Ph. 64.

Priddy v. Rose, 3 Mer. 86.

Smith v. Smith, 1 You. & Col. 338.

Woodyatt v. Gresley, 8 Sim. 180.

Mr. Cooper and *Mr. Walford*, for Winchester's assignees.—First, on Row's bankruptcy, both trustees and assignees having declined to keep up the policies, they became abandoned and derelict, and would have expired but for Winchester, who became, therefore, entitled to all that was received from them; secondly, the cases cited do not bear out the proposition of the plaintiffs. All that is established by those cases is, that where by the "same" deed a fund is vested in trustees for the benefit of A, and A. incurs a liability to the trustees, the trustees are entitled to retain the benefit in respect of the liability. The circumstances of this case are different from those of the cases cited.

Mr. Rogers, *Mr. Bourdillon*, and *Mr. Briggs*, for the trustees.

KNIGHT BRUCE, V.C.—I am of opinion, that in the absence of any contract with the trustees or with Mr. or Mrs. BurrIDGE, the fact of the payment of the premiums by Alderman Winchester, however necessary for the preservation of the property, gives him no other right than that of repayment with or without interest, and with or without a lien on the fund. There is no authority or principle for the proposition contended for by the assignees. Mrs. BurrIDGE's life interest exists in her, and is not affected by anything that has been done except as to the right of repayment. If Mrs. BurrIDGE has made any payments in respect of the premiums on the policies, she is entitled to a lien on Row's interest under the settlement, that is, a lien on the reversion of the 5,992*l.* consols, expectant on the decease of Mrs. BurrIDGE.

As to the right of the trustees to retain this fund in satisfaction of the bond,—if Mr. Winchester had not become bankrupt, and after his decease his executors had applied to the trustees for a transfer, they would have said to them, "You owe us money on

the bond of your testator; let an account be stated between us." The bankruptcy makes no difference in the claims of the trustees. There was, in fact, a mutual credit, and whether by retainer, lien, or set-off, the fund in the hands of the trustees is liable to the claims of the plaintiffs in respect of the bond.

On a subsequent day, the right to the 431*l.* was contested by the counsel for Winchester's assignees and Mrs. BurrIDGE.

KNIGHT BRUCE, V.C.—I am of opinion, that what ought to be done with the 431*l.* is a point of considerable difficulty under the peculiar circumstances of the case. I have come to the conclusion, that the safer course will be to keep back the fund for the present, and to give the assignees of Row liberty to apply if they think fit. I shall, therefore, order this fund to be carried over to a separate account, with liberty to the assignees of Row or any other person to apply to the Court, as they may be advised. If the assignees of Row think proper to come to this Court on a petition, either as petitioners or respondents, I shall be ready to hear them; but I neither encourage nor discourage the claim. I see no other safe way of disposing of it. If the assignees of Row appear, the questions will be, first, whether the assignees of Row or Winchester can displace Mrs. BurrIDGE's title, and, if they can so displace it, whether, according to the true construction of the deed of 1832, the assignees of Row or the assignees of Winchester are entitled.

On a subsequent day, a petition was presented by Mrs. BurrIDGE in respect of this fund. The assignees of Row appeared on this petition, and disclaimed all interest in the fund.

Mr. Simpkinson, *Mr. Russell*, and *Mr. Wetherell*, for Mrs. BurrIDGE, admitted that this sum had passed by the deed of the 5th of January 1832, but contended, that the trustees had the same right of retainer in respect of Winchester's bond, as they had on the other sum of stock.

Mr. Cooper, for the assignees of Winchester, contended, that to entitle A. to set off a fund in his possession belonging to B,

against a liability incurred by B. to him, all the matters must be parts of one transaction—*Whitaker v. Hall* (1). Lord Cottenham's observations in *Rawson v. Samuel* (2). Here the fund received by the trustees was foreign to the trust.

KNIGHT BRUCE, V.C.—The assignees of Row, with a full knowledge of all the circumstances, and of the expressions I have made use of respecting them, have appeared as parties respondent to this petition, and have deliberately disclaimed all interest in the subject of dispute: they are, therefore, out of the question. Certainly, however, the doubt which from the beginning I have entertained, whether the assignment from them to Winchester's assignees passed this fund, has not been removed. Had this doubt been removed, the assignees of Winchester would not have had any place here. It is not necessary to express any opinion on this point, and I leave it open, and assume, for the sake of argument, that it passed such interest as Row's assignees had in the fund. Now, it cannot be said, that the trustees obtained this fund by concealment, fraud, or wrong, though in the events that happened, the right to it might have devolved to Row's assignees. Assuming then, Winchester's assignees to have a right to this fund, still it must be treated as having come to the trustees of the settlement in their character as trustees; and, as in that character alone they claim the fund, I must take it to be liable to the same claim as the policy fund.

K. BRUCE, V.C. } **BARKER v. RAILTON.**
May 30.

Parties—Derivative Executor—Costs.

An executor may prove the will of his testator, and at the same time renounce the probate of the will of a testator, of which will his testator had been the sole executor—semble.

A defendant, failing to establish an ob-

jection for want of parties, taken in the answer, by proper evidence at the hearing, must pay the costs of the day, if the cause is to stand over for the purpose of its production—semble.

This was a suit instituted for the administration of the personal estate of Thomas Foster, by a person interested under his will. The bill stated, that Thomas Foster made his will, and thereby appointed Stephen Railton his executor, who duly proved the same; and that Stephen Railton made his will, and thereby appointed the defendants, Ruth Railton and Joseph Bayley, his executrix and executor, who duly proved the same, and thereby became the personal representatives both of Stephen Railton and Thomas Foster.

Ruth Railton and Joseph Bailey by their answer stated, that they had not acted in the administration of the trusts of the will of Thomas Foster, and that they had renounced probate of his will, and submitted whether the representatives of Foster ought not to be made parties.

Mr. Purvis, for the plaintiff.

Mr. Kenyon Parker and Mr. Jeremy, for Ruth Railton and Joseph Bayley, took the objection stated in their answer. The rule is this:—Where A. makes B. his sole executor, who proves his will, and then dies, leaving C. his executor, then if C. proves B's will, without noticing that of A, he becomes the personal representative both of B. and A; but C. is at liberty, if he pleases, to prove the will of B, and at the same time to renounce the probate of the will of A.

Hayton v. Wolfe, Cro. Jac. 614.

Wankford v. Wankford, 1 Salk. 308.

In this case, Ruth Railton and Bailey have not been constituted the representatives of Foster, and there is no representative of Foster before the Court.

[**KNIGHT BRUCE, V.C.**, said, it had been always his impression that an executor might take probate of the will of a testator, and at the same time disclaim the probate of the will of a testator, of which will his testator had been the executor (1). He then required the probate of the will.]

(1) 1 Glyn & Jam. 213.

(2) 1 Cr. & Ph. 178; s. c. 10 Law J. Rep. (n.s.) Chanc. 214.

(1) See, however, 1 Williams on Executors, p. 300, n. 3rd edit.

Mr. K. Parker contended, that as the objection had been stated on oath in the answer, it was sufficiently raised for the Court to allow it.

[*KNIGHT BRUCE, V.C.*, declined to allow the objection, unless the probate were produced, and said, that if the cause had to stand over for its production, the defendants, who had failed to establish their objection by proper evidence, must pay the costs of the day.]

In the course of the morning, the probate was produced; but as no disclaimer or renunciation appeared thereby, and no other evidence was produced of disclaimer or renunciation, the objection was overruled.

K. BRUCE, V.C. }
May 31; }
June 1. } STORY v. FRY.

Creditors' Suit—Statute of Limitations—Parties.

A, in respect of a debt due to B, gave a bill to B. in 1829, and, before the bill came to maturity, went to the East Indies. The bill, after some renewals, was finally dishonoured in 1831. A, who never returned to this country, made his will, and died abroad in 1836. Probate having been taken out in this country to A's will by C, a bill was filed by B. against C. in 1839:—Held, that the Statute of Limitations began to run only from the time of probate being taken out to A's will.

A. died seised of real estate in the East Indies, but was not interested in any real estate in this country:—Held, that the devisee and heir-at-law of A. were not necessary or proper parties in a creditors' suit for the administration of the estate of A.

This was a creditors' suit. The testator, *Bromley*, became indebted to the plaintiff in September 1829, and, in respect of this debt, drew a bill on his (the testator's) father, which was accepted by him, and before the bill came to maturity, went to the East Indies. The bill was from time to time renewed, and the last renewed bill was dishonoured in 1831. The testator made his will, and died in the East Indies in 1836, without ever having returned to this country.

Probate having been taken out in this country by two of the defendants, the bill was filed against them, in September 1839, by the plaintiff.

It was contended for the plaintiff, that the Statute of Limitations did not apply to this debt previously to the death of the testator; and that, if it did, a letter written by the testator, in 1834, had the effect of taking it out of the statute.

The bill had alleged, that the testator was seised of a house and real estate at Calcutta; that he made his will, and devised all his real and personal estate to his widow and his daughter; that his daughter was his heiress-at-law; and that administration had been taken out to his estate in the East Indies. There was no allegation that the testator was entitled to any real estate in this country, and no suggestion had been made in any of the proceedings, or at the bar, that he was entitled to any. The widow and daughter were made parties to the bill.

Mr. Kenyon Parker and *Mr. Younge*, for the plaintiff.—This case does not come within the statute 21 Jac. 1. c. 16. s. 3, and is not affected by 4 & 5 Anne, c. 16. s. 19. *Douglas v. Forrest* (1) is an express decision on the point. There the debt accrued in 1802, when the debtor was abroad. The debtor never returned to this country, and died abroad in 1817. In 1824, probate was taken out, and an action against the executors, within six years after 1824, was held not to have been barred. In *Rhodes v. Smethurst* (2), *Alderson, B.*, remarking on this case, says, "The statute never had begun to run against the plaintiff until probate was taken out to the testator."

Gage v. Bulkley, Rep. temp. Hardwicke, 278.

Murray v. East India Company, 5 B. & Ald. 204.

There are some old authorities on the subject of what is called the equity of the statute.

Mr. Russell and *Mr. Cole* appeared for the defendants, the executors.

Mr. Wigram, for the widow and daughter of the testator, submitted, that they ought not to have been made parties, and that the bill ought to be at once dismissed against

(1) 4 Bing. 686; s. c. 6 Law J. Rep. C.P. 157.

(2) 4 Mee. & Wels. 42, 51, 65; s. c. 7 Law J. Rep. (N.S.) Exch. 273.

them, with costs. By the 9 Geo. 4, c. 33, s. 1, it is enacted, that when British subjects are seised of real estate in the East Indies, that estate is assets in the hands of executors for the payment of debts. As to this estate, then, they were clearly not proper parties, and as there was no allegation in the bill, and no suggestion that the testator was seised of real estate in this country, there was no purpose to satisfy in bringing them or keeping them before the Court.

KNIGHT BRUCE, V.C. — It is admitted that the debt was incurred; that a bill was given in respect of it; that the testator went abroad before the maturity of the bill; that the bill was dishonoured; that he died abroad, without having returned to this country. On these admitted facts, upon the authorities to which I have referred, old and new, I think the Statute of Limitations does not apply. I give no opinion as to the letter of 1834. As to the question of parties, I cannot say that Mr. Wigram's clients are necessary or proper parties. I think that, upon the grounds stated by Mr. Wigram, he has a right to be dismissed, and he has requested me to dismiss him. I cannot, therefore, keep him here.

Usual creditor's decree. Bill dismissed against the widow and daughter, without prejudice to the plaintiff's right to file a new bill against them, and without prejudice to any question that may arise between the creditors and the executors, and the creditors and the administrators, in respect of the East Indian property.

K. BRUCE, V.C. } ESSEX v. BAUGH.
June 29.

Deed—Middlesex Registry Act.

A, entitled to a leasehold estate in Middlesex, mortgaged that estate to B, and died before the mortgage deed was registered, leaving C. his executor. C. executed the mortgage deed, and his execution was attested by two witnesses, neither of whom had attested the execution of the deed by any of the parties to it. A memorial of this deed, attested by these two witnesses, was placed on the register:—Held, that the deed was not properly registered.

By an indenture, dated in 1800, A. granted a lease to B. of an estate in Middlesex. This

lease was duly registered. By an indenture, dated in 1828, B. assigned this lease to C. The memorial of this indenture of assignment, placed upon the register, did not contain any description of the estate, or the parish where it was situated; but stated that there were conveyed "all that piece of land, and all the premises demised by and contained in the indenture of lease of 1800." Whether the indenture of 1828 was properly registered—quære.

This was a suit instituted for the purpose of establishing the priority of a mortgage to a settlement, and of foreclosing parties interested in the mortgaged property. The only questions in the case arose on the construction of some clauses of the Middlesex Registry Act.

By an indenture, dated in 1800, Earl Grosvenor granted a lease of a house in Grosvenor Street for sixty years to Mr. Nicholas, which lease became previously to September 1829, vested in Miss Meller.

By an indenture, dated the 9th of September 1829, being the settlement made on the marriage of Miss Meller with Mr. Fraser, the lease was assigned to trustees on trust for the separate use of Mrs. Fraser for life, without power of anticipation, and after her decease on other trusts therein mentioned.

By an indenture, dated in August 1830, Mr. and Mrs. Fraser assigned this lease to Mrs. Canham, for the purpose of securing a sum of money advanced by her to Mr. Fraser.

The 1st section of the Middlesex Registry Act (7 Anne, c. 20) declares, that all deeds not registered, shall be void as against deeds subsequent in date, which are registered.

By the 6th section of this act, it is enacted, "That every memorial of a deed or conveyance shall (among other things) express or mention the lands, tenements, and hereditaments contained in every such deed or conveyance, and the names of all the parishes within the said county where any such lands, &c. are lying or being, in such manner as the same are expressed and mentioned in such deed or conveyance, or to the same effect." By the 7th section, it is enacted, "That where there are more writings than one for making any conveyance, which name, mention, or affect the same lands, tenements, and hereditaments, it should be a sufficient

memorial if all the lands, &c. and the parishes where the same lie, be only named or mentioned in the memorial of any one of the deeds or writings, and the dates, &c. of the rest of the deeds only be inserted in the memorials of the same, with a reference to the deed, whereof the memorial is so registered, that contains the parcels mentioned in all the said deeds, and directions how to find the registering the same."

By the 5th section, it is enacted, "That every memorial of deeds or conveyances should be under the hand and seal of some or one of the grantors or grantees, his or their executors or administrators, attested by two witnesses, one whereof to be one of the witnesses to the execution of such deed or conveyance, which witness was to prove upon oath the signing and sealing of the memorial, and the execution of the deed or conveyance mentioned in the memorial."

A proper memorial of the lease of 1800 was entered on the register.

In 1828, soon after the marriage, a memorial of the marriage settlement was entered on the register in the proper form, with the exception, that instead of giving the description of the house in Grosvenor Street, and the name of the parish where it was situated, as contained in the settlement, it was stated, that there were conveyed by the indenture of settlement "all that piece or parcel of ground, and all that messuage or tenement, and all and singular other the premises demised by and comprised in a certain indenture made, &c. (being the lease of 1800).

In 1830, soon after the mortgage, a memorial of the mortgage deed was placed upon the register in the proper form, with the same exception as above mentioned with respect to the memorial of the settlement.

At the date of the mortgage deed, Mrs. Canham had no notice of the settlement, but, in 1839, Mrs. Canham being then dead, her executor, having become acquainted with the fact of the settlement having been made, and being aware of the defects in the memorials of the settlement and mortgage deed, signed his name in the mortgage deed under that of Mrs. Canham, and procured an attestation of this execution by two witnesses, neither of whom had attested the execution of the mortgage deed by any of the parties to it. He then placed on the register a memorial

of the mortgage deed, with a proper description of the house, which memorial was attested by the two witnesses.

The bill was filed by the executor of Mrs. Canham against the trustees, Mrs. Fraser, and other parties interested in the property, for the purpose of establishing the priority of the mortgage deed to the settlement, and of foreclosing the parties interested under the settlement.

Mr. Wigram and *Mr. Bagshawe*, for the plaintiff, contended, that the memorial of the settlement was void, because it did not contain a description of the house, and the name of the parish, as required by the 6th section. The exception in the 7th section does not apply. See *Sugden's Ven. & Pur.*, 10th edit. vol. 3, p. 355. It may be objected, that the second memorial of the mortgage is also void, on the ground, that the requisitions of the 5th section have not been complied with. This objection is not fatal. In *Mr. Rigge's* book on the Registry Acts, p. 77, is the following passage:—"If a considerable time has elapsed from the date of a deed intended to be registered, and all the witnesses are dead, or the testimony of any of them is not easily to be obtained, no further delay need originate from either cause, as the re-execution of such deed by any one of the parties, in the presence of a new witness, shall be sufficient to effectuate the registry." *Mr. Rigge* was deputy register, and had an intimate acquaintance with the Registry Acts, and their operation, and the practice under them. It has been ascertained, that it is the constant habit and practice of the office to admit memorials, such as that of 1839, on the register, and that it is considered by the officers as sufficient. They submitted, that, if the Court should be against them on this point, a case ought to be sent to a court of law.

Mr. Temple and *Mr. Willcock*, for the trustees.—First, the memorial of 1828 is sufficient, as coming within the exception of the 7th section. It has been the constant practice of the Registry office to admit such memorials. If the Court were to hold that such memorials were void, a vast amount of property would be placed in peril. Secondly, the memorial of 1839 is clearly void. The method adopted by the plaintiff is manifestly as without the spirit as it is without the letter of the 5th section. The authority of

Mr. Rigge has been relied on ; but there is authority far greater than that of Mr. Rigge against his position. Mr. Rigge's book was published in 1798. In the early editions of Sir Edward Sugden's *Vendors and Purchasers*, published between twenty and thirty years ago, this very passage has been cited, and its authority denied. See *Sugd. Ven. & Pur.*, vol. 3, p. 351, 10th edit. Thirdly, even admitting the invalidity of the memorial of the settlement, and the validity of the plaintiff's memorial, since the plaintiff had express notice of the settlement at the time he placed this memorial on the register, he cannot derive any protection or assistance from it—

Hine v. Dodd, 2 Atk. 275.

Wyatt v. Barwell, 19 Ves. 435.

They pressed the Court to decide the points, without sending any case to a court of law.

Mr. Koe and *Mr. Chandless* appeared for other parties.

Mr. Wigram, in reply.

[In the course of the argument, the Vice Chancellor observed, with reference to the third point made by the defendants, that the notice in the cases cited had reference to the time of taking the security, and not to the time of registering the deed. A person who had taken a security, without notice of a prior incumbrance, might, after such knowledge, register his deed for the purpose of protecting himself against it, in the same manner as he might get in a term.]

KNIGHT BRUCE, V.C.—Had the questions in this case turned alone on the insufficiency of the memorial of the settlement, I should have sent a case to a court of law. As the case however stands, there is no occasion that this point should be decided. As marriage is a valuable consideration, the settlement is prior in title to the mortgage, unless this priority is affected by the memorial of the mortgage deed. [His Honour here read the 5th section of the Registry Act.]—Here the second memorial of the mortgage has been attested by two witnesses, neither of whom attested the execution by any of the parties to the mortgage deed. It appears that the executor of Mrs. Canham, not being a party to the mortgage deed in his own right, takes upon himself to practise the somewhat absurd ceremony of putting his name under Mrs. Canham's in the mortgage

deed, and having procured this execution to be attested by two witnesses, introduces their names in a memorial of the mortgage deed. Here is no attestation of the memorial by any witness to the execution of the deed by any of the parties to it. It is hardly possible to speak seriously of the point. This then is not, in my opinion, such a memorial as satisfies the requisitions of the act. Putting aside the first two memorials, there is no memorial on the register, and the settlement must prevail, as being prior to the mortgage. Admitting the two memorials, that of the settlement is prior to that of the mortgage. It struck me, at first, after hearing the passage from Mr. Rigge's book, and what was stated by counsel as to the practice of the office, that, however clear my opinion might be, I ought to have sent a case to a court of law. Considering, however, that in another publication, very well known and of great celebrity, which has been in the hands of the public for upwards of twenty-five years, this position has been disputed and denied, I think I ought to act on my own view of the case, and decide the point myself.

I must dismiss the bill against Mrs. Fraser, without costs, but without prejudice to any legal proceedings. I shall not give her any costs as a fraud was committed by her, and a married woman has no privilege in that respect.

K. BRUCE, V.C. } EYSTON v. SYMONDS.
June 23.

Specific Performance.

An estate had been enjoyed by A, and those claiming under A's will, from 1785 to 1840. In February 1840, B, who claimed a title to the estate under A's will, entered into a contract with C. for the sale of the estate. In April, C, from answers elicited to questions put to B, became acquainted with the fact that A. had been an alien, and that there was a doubt whether the estate had not escheated to, and was not then vested in the Crown. This fact did not appear in the abstract. The doubt formed the subject of a negotiation between B. & C. from April to October 1840. In February 1841, B. filed a bill for specific performance against C; and C. by his answer stated the objection, and

submitted that he ought not to be compelled to perform the agreement until this objection had been removed. A reference for title having been directed, the Master reported that the estate at the date of the contract was vested in the Crown, but that between the order of reference and the report, B. had obtained a grant from the Crown, and had shewn a good title from the date of such grant. At the hearing of the cause upon this report,—Held that, considering the nature of the defect, and having reference to the negotiation in 1840, and the frame of the defendant's answer, B. had a right to make his title in the Master's office, and a specific performance was decreed.

Sir John Gallini, an alien, purchased, in 1785, the equity of redemption of an estate at Gattenden, in Berkshire. In 1787 he obtained letters of denization. In 1799 he made his will, by which he devised this estate to trustees for the benefit of his children. In 1803 the legal estate was conveyed to him, and in 1805 he died. All his children had been born previously to the year 1787. The estate had been quietly enjoyed by Sir John Gallini, and those claiming under his will, from 1785 until the filing of the bill in this suit.

In February 1840, the plaintiff, who was a trustee for sale of the estate, and whose claim thereto was derived under Sir John Gallini's will, and subsequent conveyances, entered into a contract for the sale of this estate with the defendant, and a deposit was paid. It did not appear in the abstract of title delivered to the defendant that Sir John Gallini had been an alien, and obtained letters of denization; but these facts were elicited from the vendor by the defendant, in answer to questions put by him, and became known to him in the month of April. The objections to the title, which arose in consequence, formed the subject of considerable discussion and negotiation between April and October. The defendant some time after October, not being satisfied with the title, brought an action to recover the deposit, and in February 1841, the plaintiff filed a bill for specific performance. In his answer to this bill, the defendant stated as objections to the title, first, that Sir John Gallini had died intestate as to the legal estate in

the property, as it had not been conveyed to him until after the date of his will, and that, as all his children had been born previously to the year 1787, when he received his letters of denization, not one of them could inherit it, and that consequently it vested in the Crown: secondly, that the conveyance of 1785 did not effectually convey to Sir John the equitable estate, and that, as letters of denization have not a retrospective operation, he had no interest whatever in the land at the date of his will. Sir John had therefore died intestate both as to the legal and equitable estate in the property, which had escheated to, and become vested in, the Crown at his death. The defendant then stated that he refused to complete the title on the above grounds, and submitted that he ought not to be compelled to a specific performance until these objections were removed.

The plaintiff obtained an injunction to restrain the defendant from prosecuting his action, and the usual reference for title.

The Master by his report found, that the whole estate, legal and equitable, had escheated to the Crown, and was vested in the Crown at the date of the contract; and that, between the date of the reference and the report, the plaintiff had obtained a grant from the Crown, and that a good title had been shewn from the date of the grant.

The cause now came on on this report.

Mr. Wigram and *Mr. Parry*, for the plaintiff.

Mr. Cooper and *Mr. Collins*, for the defendant, contended, that the bill ought to be dismissed with costs against the defendant. A vendor has the right, within certain limitations, of completing a title in the Master's office, which was imperfect at the date of the contract; but such a case as the present does not fall within that rule. The trustee here at the date of the contract had no estate whatever, legal or equitable, and he could not, by the ordinary course of law or equity, have acquired any estate. Such a person was not entitled to any relief against a party whom he had drawn into a contract. This is distinctly laid down by Sir E. Sugden—1 *Sugd. Ven. & Pur.* 346, 10th edit.

Boehm v. Wood, 1 Jac. & Walk. 419;

Cumming v. Forrester, 2 Jac. & W. 334;

Dalby v. Pullen, 1 Russ. & Myl. 296 ;
s. c. 8 Law J. Rep. Chanc. 74 ; and
Chamberlain v. Lee, 10 Sim. 444 ; s. c.
8 Law J. Rep. (N.S.) Chanc. 267 ;
were also referred to.

KNIGHT BRUCE, V.C.—The estate in question was purchased by Sir John Gallini in 1785, and he appears to have continued in the enjoyment of it from that time to his death, which occurred in 1805, from which time to the present the estate has been enjoyed by the family, or by those who claimed under them. There has, therefore, been an enjoyment of more than half a century under this title of Sir John Gallini. The trustee of the family, being in possession under such title, was desirous of selling the estate, and by no possibility can any degree of blame be attached to him for professing to sell that which he had every reason to believe was his own. It appears that Sir John Gallini was an alien, and that, when the purchase of the equity of redemption was made, he had not gained letters of denization. Those letters he subsequently acquired, and also the legal fee, which legal fee was afterwards escheated to the Crown. This objection to the title of the trustee has been made the subject of considerable negotiation between the parties to this suit, and was not removed until after the title was in the Master's office. It is now alleged that such a case as the present is not one of those, in which the rule holds, that the vendor should be allowed to make his title if he can, after the stipulated time. It has been asserted to be a case in which a person had sold an estate not his own ; that he had acquired a new title, and was not supporting the old one. I cannot, however, view the case in such a light. The old title did exist, and the estate was descendible according to it. True such title was subject to the chance that the Crown might raise a claim and defeat that title. Such title however was good until so defeated. What was required to be done was not to acquire a new title, but only to relieve the title from that defeasibility to which it was before subject. The only effectual mode for doing that was, that the Crown should seize the estate, that an inquisition should be taken, and on the return to that

inquisition that there should be a grant from the Crown. All this has taken place.

I am of opinion that the title is clearly within the established doctrine of the Court, allowing a vendor, within certain limitations as to time, to make a good title, if he be able, even, in some cases, after the matter has left the Master's office.

There is one point which has struck me. The abstract, as originally delivered, contained neither the letters of denization nor the fact of the alienage, and the purchaser, but for questions put by him, and the discovery elicited in the answers to them, might never have known the defect, and have taken the estate with this blot or infirmity on the title. It is possible, but I give no opinion on the point, that if, at the moment of discovery, the purchaser had held his hand, and said, "I have been deceived ;" there being in truth a material fact kept back, which was within the vendor's knowledge, it is possible, I say, whether there was or was not intentional deception, that the purchaser might have been relieved from the necessity of completing his contract. Instead, however, of adopting that course, the parties commence a negotiation on the subject in the spring of 1840, and it is not till the latter end of that year that the matter is brought to a conclusion. Having regard to what has taken place between the parties in the interval between April and October 1840, and to the frame of the answer, I am of opinion that the point is not now open to the purchaser, and that there must be a decree in favour of the vendor. A specific performance must be decreed, but the vendor must pay all costs at law and in equity up to the confirmation of the Master's report, and after that no costs could be given on either side.

M.R. }
Feb. 22, 23. } KIRKMAN v. ANDREWS.

Plea—Want of Parties.

Averment on information or belief as to the transactions of others, sufficient.

The bill was filed by Charles Felton Kirkman, claiming an equivalent for salary, against William Andrews, and others, and

praying that the defendants might be declared to be liable in respect of certain payments made by him, at their request. The defendants, Andrews and others, put in a plea, which stated, "that defendants had been informed that the complainant did, for some time before the month of June 1821, carry on business, and was a trader within the true intent and meaning of the bankrupt laws, and was before and on the day next thereafter mentioned indebted, on account of dealings and transactions in his business, to many persons, to a large amount; and that the said complainant, before the day next thereafter mentioned, committed one or more acts of bankruptcy.

The plea, after stating that certain proceedings in bankruptcy were had, and that the said complainant ultimately obtained his certificate, proceeded to state that the defendants had been informed that the complainant did, after the date of the said certificate, and for some time before, and in the month of January 1827, carry on business; that another fiat in bankruptcy issued against him; and it submitted, that the assignees under the last-mentioned fiat were necessary parties to the suit.

Mr. Chandless, for the plaintiff.—The plea is not against the relief which is sought for by the plaintiff, but for want of parties; and because it tenders no issue, in fact, and with certainty, therefore the plea is bad.

Mr. G. Turner, in support of the plea, cited the cases of—

Fawkes v. Pratt, 1 P. Wms. 593; and

Goet v. Armitage, 2 Anst. 412,

to shew that an uncertificated bankrupt will not be allowed to sue in equity, without making his assignees parties; and contended, that the averments in the plea were sufficient, as they related to facts not within the knowledge of the defendants.

Mr. Chandless, in reply.—The plea sets forth the matters charged therein too generally, and is founded on information only; whereas the averments should have been as to the knowledge and belief of the defendant, on which an indictment for perjury could have been brought.

Lord Redesdale's Tr. C. 236.

Drew v. Drew, 2 Ves. & Bea. 160.

Small v. Atwood, You. 449; s. c. 2 Law J. Rep. (n.s.) Exch. Eq. 1.

The MASTER OF THE ROLLS.—The plea of the defendants is founded on the ground that the plaintiff is not entitled to sue alone, and without his assignees being made parties to the bill; but this objection has been disposed of, and the only question which remains is, whether the plea of the defendant is not bad, because, instead of alleging facts, it only states on information or belief that the facts are as alleged. These allegations, however, refer to the acts and dealings of others, and are not facts necessarily or probably within the knowledge of the defendants. The rule has been correctly stated, that averments of facts in a plea should generally be positive, on which the plaintiff may join issue; but in *Drew v. Drew*, Sir Thomas Plumer says, "Where a person is speaking upon his oath to acts not his own, but done by others, it is sufficient if he states them upon his belief—and more positive averment is not necessary." No direct authority has been cited, requiring a defendant to plead positively facts not in his own knowledge; and I think that the facts in the plea are sufficiently pleaded to put the matters in question in issue, and the plea must therefore be allowed.

M.R. }
May 23. } DAVIS v. PROUT.

Practice.—24th Order of August 1841.

Where a party applies for an order under the 24th of the General Orders of August 1841, an affidavit must be produced, that no account, &c. is sought against the defendant.

Under the 23rd Order of August 1841, one of the defendants had been served with a copy of the bill, and a motion was now made on behalf of the plaintiff, in compliance with the 24th Order, for an order for leave to make an entry at the six clerks office, of a memorandum of such service, and of the time when such service was made. The 23rd Order applies only to cases where "no account, payment, conveyance, or other direct relief is sought against a party to a suit;" and the question was, how the Court could be satisfied that this case was within the application of the order.

Mr. Rogers supported the motion.

The MASTER OF THE ROLLS said, that an affidavit must be produced, stating, that no account, payment, conveyance, or other direct relief, was sought against the party who had been served with a copy of the bill.

Note.—The affidavit should also state that the party is not an infant.

M.R. }
May 23. } KENT v. JACOBS.

Practice.—23rd Order of August 1841.

A husband and wife were defendants to the suit, and a copy of the bill was served on the husband alone. The suit did not relate to the separate estate of the wife:—Held, that this was good service to found an order upon, under the 24th of the general Orders of August 1841.

In this suit, a copy of the bill had been served on one of the defendants, whose wife was also a defendant, but no copy of the bill had been served on her.

Mr. Shebbeare, for the plaintiff, now moved for an order under the 24th of the Orders of August 1841, and a question was raised, whether the service on the husband alone, was sufficient foundation for an order under the 24th Order.

The bill did not relate to the separate estate of the wife.

The MASTER OF THE ROLLS held, that the service of the copy of the bill on the husband alone, was sufficient service.

M.R. }
July 13. } CURTIS v. LUKIN.

Legacy—Remoteness.

A testator bequeathed some houses in Church Street, held upon leases having from sixty to seventy years unexpired, to trustees, for E. C. for her life, and after her decease, for her children, with a gift over to other parties, if E. C. died without leaving any child. And the testator bequeathed other premises held on lease having rather more than twenty-two years unexpired, upon trust to accumulate the rents, until the leases of the premises in Church Street were nearly ex-

pired, and then to renew those leases, and repair the premises, for the benefit of E. C. and her children, and the other legatees before mentioned:—Held, that the direction to accumulate was void for remoteness.

Shadrach Venden, the testator in the cause, by his will, dated the 29th of August 1794, after other devises and bequests, bequeathed to four trustees two leasehold houses in Church Street, in the parish of St. Ann, Soho, Westminster, upon trust for the benefit of the testator's niece, Elizabeth Cheverell, for her life, for her separate use, and after her death, for the benefit of her child or children, in equal shares, if more than one; but in case Elizabeth Cheverell should not, at her decease, leave any child or children, then he bequeathed the said premises to his nephew S. V. Cheverell. The testator then bequeathed to his said nephew S. V. Cheverell, four other leasehold houses in Church Street, and another leasehold house in Crown Street, for the residue of all such term, estate, and interest as he should have therein at the time of his death; and he also bequeathed to his said executors and trustees two leasehold houses in Long Acre, and three leasehold houses in Oxford Street and Audley Street, upon trust to receive the rents, issues, and profits of the two houses in Long Acre, and lay out the same at interest upon government securities, until the then term which he had therein should be nearly expired, and then to lay out such part of that money as they should think necessary, for renewing the leases thereof, and then in rebuilding or repairing the same, and when the same should be completed, in trust for, and he gave and bequeathed the said two leasehold messuages or dwelling-houses and appurtenances in Long Acre aforesaid, to his great-nephew Edward Venden, his executors, administrators, and assigns, for all the residue and remainder then to come and unexpired of the term for which such renewal should be obtained: and upon further trust that his said trustees should, from time to time receive the rents, issues, and profits of the said three leasehold messuages or dwelling-houses situate in Oxford and Audley Streets aforesaid, and lay out the same at interest, till his said leasehold messuages or tenements thereinbefore mentioned, situate and being

in Church Street aforesaid, should become nearly expired, and then to pay and apply such part thereof as should be necessary in the renewal of his said several leasehold messuages or tenements, situate and being in Church Street aforesaid, for the benefit of the respective persons to whom he had before, by that his will, given the same; and as to the money arising from the rents of his said houses in Oxford Street, Long Acre, and Audley Street, and the interest arising therefrom, after answering the purposes aforesaid, in trust for, and he gave and bequeathed the same between his said great nephew Edward Venden, his said nephew S. V. Cheverell, and his said niece Elizabeth Cheverell, equally to be divided between them, share and share alike; and the testator gave all his residuary estate to the same three legatees in equal shares.

The testator died in 1795 or 1796. Elizabeth Cheverell married Mr. Thomas Curtis, who had died, and had four children, the plaintiff and three of the defendants.

The term for which the houses in Long Acre had been held by the testator, had expired; and shortly before the expiration thereof, the trustees obtained a new lease, and repaired the houses, and assigned them to Edward Venden.

The leases of the houses in Oxford Street and Audley Street, expired in March 1817. An accumulation had been made for some years, but in 1819 (as was alleged) the accumulation had been divided among the representatives of Edward Venden, S. V. Cheverell, and the husband of Elizabeth Curtis.

The leases of the two houses in Church Street, bequeathed to Elizabeth Curtis, and her children, would expire in 1857 and 1863 respectively.

The bill was filed by Thomas Venden Curtis, against his mother and her other three children, and the trustees under the will, and the residuary legatees or their representatives, and prayed for an account of the rents, issues, and profits of the premises in Oxford Street and Audley Street, and of the securities in which they had been invested, and that the said funds, or a competent part thereof might be applied in the renewal of the leases of the two houses in Church Street; and that the residue, if any, might be applied upon the trusts of the will.

Mr. Kindersley and *Mr. Younge*, for the plaintiff, contended, that the leases of the premises in Church Street would not continue beyond the time during which Mrs. Curtis, the tenant for life, might very probably live; and if she died before that time, other parties would acquire an absolute interest in the property, which would enable them to dispose of it immediately, and put an end to the accumulations.

Mr. Pemberton, *Mr. Hodgson*, and *Mr. James*, for the defendants, insisted, that at the death of the testator, the leases of the premises in Church Street had between sixty and seventy years to run, and that there was no certainty that any parties would be in existence, who could terminate the accumulations within the time which the law allowed for accumulation, namely, twenty-one years after a life or lives in being. They also contended, that the trusts were void for ambiguity, as the will did not mention any term for which the leases were to be renewed, or any fine which was to be paid; and the direction to renew applied to his houses "in Church Street," without referring particularly to the two houses in which the plaintiff was interested in remainder.

Mr. Spence, *Mr. Hall*, *Mr. Bacon*, *Mr. Beales*, and *Mr. Renshaw*, appeared for other parties.

The following authorities were cited :—

Proctor v. the Bishop of Bath and Wells, 2 H. Black. 358.

Lade v. Holford, 1 W. Black. 428.

Brackenbury v. Brackenbury, Ambl. 474.

Ibbetson v. Ibbetson, 10 Sim. 495; s. c.

10 Law J. Rep. (N.S.) Chanc. 49.

Browne v. De Laet, 4 Bro. C.C. 527.

Caldecott v. Caldecott, 10 Law J. Rep. (N.S.) Chanc. 178.

Carter v. Bentall, 2 Beav. 551; s. c. 9 Law J. Rep. (N.S.) Chanc. 303.

Scatterwood v. Edge, 1 Salk. 229.

Leake v. Robinson, 2 Mer. 363.

Ware v. Polhill, 11 Ves. 257.

Lord Southampton v. Lord Hertford, 2 Ves. & Bea. 54.

Fearne, Cont. Rem. 6th edit. p. 582, n.

The MASTER OF THE ROLLS, after stating the facts of the case, said, that he must look at the state of the circumstances which ex-

isted at the time of the death of the testator, and the directions in the will ; and although events might take place, which would give certain parties an absolute power of disposition over this property, within the time which the law permitted, still, as the directions to accumulate were not clearly within the limit allowed by law, his Lordship considered the will void for remoteness ; and that, therefore, without any reference to the other objections which had been taken to it, this bill must be dismissed with costs.

M.R. }
July 12, 15. } DODSWORTH v. ADDY.

Legacy—Construction.

A testator bequeathed the income of his residuary estate to his wife for her life ; and after her decease, the residuary estate was to be equally divided among his brothers and sisters, and the brothers and sisters of his wife. And he directed, that in case of the death of any of his residuary legatees before his or her share should become payable, leaving issue, such issue should take that share equally :—Held, that the grandchildren of any of the residuary legatees who died before his or her share became payable, were entitled equally with the children.

William Dodsworth, by his will, dated the 17th of November 1820, after giving to his wife Agnes the income of his real and personal estate for her life, and bequeathing several legacies to be paid at her death, directed the residue of his estate to be paid as soon as conveniently might be after the death of his wife, unto and equally among his own brothers and sisters, Henry Dodsworth, Elizabeth Lewer, Jane Doggett, and the children of his late brother Thomas, whom he thereby directed to take the share which would have gone to his brother Thomas, had he been living, and all the own brothers and sisters of his wife in equal shares. And he then continued as follows : “ And in case of the death of any one or more of them, my said last-mentioned legatees, before his, her, or their share or respective shares shall become due and payable, leaving lawful issue of his, her, or their body or respective bodies, then the share of

him, her, or them so dying, to go to such issue, to be equally divided between and amongst them, if more than one. But in case of the death of any of them, my said last-mentioned legatees, without leaving lawful issue, before his, her, or their share or respective shares shall become due and payable, then the share or shares of him, her, or them so dying, to go and be paid to and equally divided between and amongst all and every the survivors of them, my said brothers and sisters, and the children of my said brother Thomas, they taking their father's share, and the own brothers and sisters of my said wife, share and share alike.”

The testator died in May 1823, and his wife in January 1831.

The testator's wife had three brothers and one sister, some of whom had left grandchildren as well as children ; and the question was raised, whether the word “ issue,” in the will, would include the grandchildren, so as to entitle them to an equal share with their parent.

Mr. Turner, Mr. Pemberton, Mr. Kindersley, Mr. James Parker, Mr. Shadwell, and Mr. Hall, appeared for different parties.

The following cases were cited :—

Freeman v. Parsley, 3 Ves. 421.
Hockley v. Mawbey, 1 Ves. jun. 143.
Leigh v. Norbury, 13 Ves. 340.
Bernard v. Mountague, 1 Mer. 422.
Davenport v. Hanbury, 3 Ves. 257.

The MASTER OF THE ROLLS held, that the children and grandchildren were all equally entitled under the words of the will.

V.C. }
July 15. } CAMPBELL v. CAMPBELL.

Executor—Indian Commission.

An executor having proved a testator's will in India, and having collected a portion of the assets, returns to England, and appoints agents to collect the remaining assets in India :—Held, that the Indian commission of 5l. per cent. can be allowed only for such assets as the executor himself collected while he resided in India.

Charles Hay Campbell, the testator, in the pleadings mentioned, by his will, dated the 16th of October 1831, gave and bequeathed all his property to his wife and children, and appointed his four brothers executors, one of whom, George Gunning Campbell, alone proved the will in Calcutta, on the 10th of August 1832. G. G. Campbell then came to England, after having possessed himself of a portion of the testator's assets, and invested them on mortgage in India. Upon his coming to England, he proved the will of the testator in the proper Ecclesiastical Court in this country, on the 29th of January 1836.

This bill was filed by the wife and children of the testator, against the executors, praying that an account might be taken of the personal estate and effects of the testator, and that the same, after payment of the debts and legacies of the testator might be secured for the benefit of the plaintiffs. Upon the cause coming on, a reference was directed to the Master to take the usual accounts.

During the residence of the executor in England, many other sums, forming part of the testator's assets, were got in by two gentlemen, Colonel Battiene and Colonel Casement, who had been friends of the testator, but who acted in the capacity of agents for the executor, and sent home to him the monies so collected, charging him at the same time one quarter per cent. by way of commission. In taking the accounts in this suit, the Master decided that the executor was entitled to receive the usual commission of 5l. per cent., allowed to all executors collecting assets in India, not only for what was actually received by him in India, but also upon what was sent to England by Colonels Battiene and Casement. To this report the plaintiffs excepted, on the ground, that the Master ought not to have allowed 5l. per cent. commission, upon any of the assets of the testator, which had been sent home to the executor during his residence in England.

Mr. Stuart and *Mr. D. James*, in support of the exception to the Master's report.—No case has ever decided that an executor might live in England, and pay another person to collect debts in India: the only reason why executors have been allowed so

large a commission in India, was to induce them to accept the office, and collect the money themselves.

Denton v. Davy, 1 Moo. P.C. 15.

Cockerell v. Barber, 1 Sim. 23; s. c. 5 Law J. Rep. Chanc. 77.

Mr. Richards and *Mr. Keene*, for the respondents, contended, that the Master was right in allowing the commission for such monies, as had been collected in India, and sent home to the executor, for such was the law in India, and the law recognized and settled in England. That the executor had the trouble and responsibility of collecting the debts, and it was the same thing, whether he did it himself or through his agent.

Chetham v. Lord Audley, 4 Ves. 72.

Freeman v. Fairlie, 3 Mer. 24.

Arnold v. Arnold, 2 Myl. & Cr. 256; s. c. 6 Law J. Rep. (N.S.) Chanc. 218.

The VICE CHANCELLOR, (without hearing a reply).—I well remember having occasion some years ago, to ascertain what was the law upon this subject; and it remains fixed in my mind, that an executor can only charge commission, while he is in India, for assets which he himself has collected there: if those assets come to this country, of course the same commission will be allowed him. The language used by Sir John Leach in the case of *Cockerell v. Barber*, I consider quite sufficient to establish the point. I did not rely only upon my own opinion in the case of *Denton v. Davy*, for it was all the judicial committee who decided that; and I take it to be the established law, as laid down by Lord Rosslyn, expressed by Sir John Leach, and affirmed by Lord Eldon: therefore, I think the exceptions must be allowed, and it must be declared that the Master, in taking the account, shall allow commission only, in respect of the assets collected by the executor while he resided in India. In the case of *Hovey v. Blakeman* (1), the question was, where money was remitted to a person, who died before it reached him, and the executors received it, whether they were entitled to charge commission, and it was decided they could not.

(1) 4 Ves. 596.

V.C. . }
 July 14. } COLLINS v. COLLINS.

Practice.—Defendant out of Jurisdiction—Revivor.

A. made defendant in an original suit, being out of the jurisdiction of the Court, never appears to the bill, nor is he served with subpoena to answer; he dies abroad, and letters of administration are taken out to his estate, and the suit revived against his administratrix, who denies assets, but submits to account. On objection taken, that he was no party to the original suit, and that a bill of revivor was not the proper course:—Held, that, as his representative submitted to account, the decree could be made against his estate.

The facts of this case, with the decree of his Honour the Vice Chancellor of England, and the appeal to the Lord Chancellor, confirming the Vice Chancellor's decree, will be found in 8 *Law J. Rep.* (N.S.) Chanc. 51, under the title of *Clough v. Bond*. The cause now came on upon bills of revivor and supplement. In the month of June 1837, Louisa Revell Clough, the plaintiff in the original suit, died in the East Indies, and the suit thereby became abated, although such proceedings, as above stated, were had in the said cause, before the intelligence of her death reached this country, and on the 10th of May 1839, letters of administration to her estate were granted to Caleb Welch Collins, the father of the present plaintiffs. On the 6th of March 1840, Caleb Welch Collins also died, whereby such administration was determined, and on the 18th of May 1841, letters of administration of the estate of the said Louisa Revell Clough were granted, by the proper Ecclesiastical Court, to Caleb Collins and Anne Elizabeth Collins, the plaintiffs in the supplemental suit, who thereby became the legal personal representatives of the said Louisa Revell Clough, and entitled to what might be recovered in the said suit, in respect of her share. On the 21st of July 1841, the said Caleb Collins and Anne Elizabeth Collins, filed their bill of revivor against Emily Bond, George Capper, George Preston, and William Rodwell, four of the defendants in the original suit, against whom a decree had been pronounced, which was confirmed on

appeal to the Lord Chancellor, and by an order dated the 10th of August 1841, the said suit was revived. It having become known that Thomas Roup Dixon, residing out of the jurisdiction of the court, a defendant to the original bill, and through whose default the suit arose, had died in the year 1838 abroad, never having appeared to the bill, on the 10th of July 1841, letters of administration of the estate of the said Thomas Roup Dixon, limited for the purposes only of the proceedings in the said suit, were granted by the Prerogative Court of the Archbishop of Canterbury, to Mary Collins, spinster, the defendant in the present suit. On the 5th of November 1841, the plaintiffs filed their supplemental bill against the said Mary Collins, as such administratrix of the said Thomas Roup Dixon, praying that they might have the benefit of the said suit and proceedings against her, as such representative, in the usual manner. The said Mary Collins appeared and put in her answer to the bill, and the cause came on to be heard in December 1841, when it stood over, with liberty to amend the supplemental bill, by adding proper parties, and bringing before the Court a sufficient legal personal representative of the said Thomas Roup Dixon, by some one taking out a general administration to his estate, the limited administration already granted not being sufficient for the purposes of the suit. On the 21st of June last, letters of administration, with the will annexed of the said Thomas Roup Dixon, were granted to the defendant Mary Collins. The defendant, in her answer, admitted generally the statements contained in the bill, but denied that any effects belonging to the said Thomas Roup Dixon had come to her hands, he having died abroad insolvent.

Mr. Richards, Mr. Walker, and Mr. Rolt, for the plaintiffs.

Mr. Clarke, for the defendant Mary Collins.

Mr. Whitmarsh and Mr. Whitmarsh, jun., for all the other defendants, contended, that Thomas Roup Dixon was no party to the original bill, as, though named, he was never served with process, and that at his death, his representatives could not be brought before the Court, simply by bill of revivor and supplement, but that the proper course would be, by original bill, as against such

representatives, though supplemental as respected the other defendants, and that he was entitled to take such objection, as being interested in the accounts being effectually taken against the representatives of Thomas Roup Dixon.

Asbee v. Shipley, 6 Mad. 296.

Stewart v. Nicholls, Tamlyn, 307.

Crowfoot v. Mander, 9 Sim. 396; s. c. 9 Law J. Rep. (N.S.) Chanc. 340.

The VICE CHANCELLOR.—I think, that although this objection is very properly taken, and the decision in *Asbee v. Shipley* is indisputably right, yet, as the representative of Roup Dixon does not object, and submits to an account, I am enabled to decree the accounts as against his estate, as the suit is now constituted.

Decree as against the defendants, similar to that under the original decree, excepting that accounts of Roup Dixon's estate are to be taken.

V.C. }
May 27. } BROWN v. BAMFORD.

Baron and Feme—Separate Property of Married Woman—Legacy—Anticipation.

A testator gave certain property in the usual form, in trust for the separate use of a married woman, "and her receipts, notwithstanding her coverture, to be good and sufficient discharges for so much of the rents and dividends as should therein be expressed to have been received":—Held, that this clause was not sufficient to restrain anticipation, but should have contained negative words, that no receipt should be a sufficient discharge to the trustees, except a receipt from time to time for so much of the rents, dividends, &c., as should have already become due.

John Beckett, by his will, dated the 21st of February 1832, amongst other things, gave, devised, and bequeathed to his trustees, their executors, administrators, and assigns, certain leasehold messuages, or tenements, and also certain stocks, funds, and securities, upon trust, nevertheless, from time to time during the natural life of his daughter Sophia Bamford, or until she should be duly declared a bankrupt, or take the benefit of any act passed, or to be passed, for the

relief of insolvent debtors, to pay the clear rents, interest, dividends, and proceeds of the said leasehold hereditaments, stocks, funds, and securities unto such person or persons, for such intents and purposes, and in such manner as the said Sophia Bamford, by any writing or writings under her hand, when and as the same should become due, but not by the way of assignment, charge, or other anticipation thereof, should, notwithstanding her present or any future coverture, direct or appoint, and in default of any such direction or appointment, or so far as the same, if incomplete, should not extend, into her proper hands for her sole and separate use, independent of the debts, controul, or interference of her present or any future husband, for which purpose the said testator thereby directed that the receipts, in writing, under the hand of his said daughter Sophia Bamford, should, notwithstanding any such coverture as aforesaid, be good and sufficient discharges for the last-mentioned rents, interest, dividends, and proceeds, or so much thereof, as should in such receipts respectively be expressed to have been received.

Sophia Bamford, after the death of the testator, signed a paper, agreeing to guarantee the payment of a certain debt, contracted by her son-in-law, to a banking company. The bill was filed by an officer of the company against Sophia Bamford and her husband and the trustees, to enforce payment of the debt so guaranteed, charging that she had rendered the whole of the property, left by the testator, liable to the payment of the debt, to the extent of her right in the same.

To this bill a demurrer was put in.

Mr. Bethell and *Mr. Bailey*, in support of the demurrer, contended, that Sophia Bamford was restrained, by the proviso against anticipation, from charging her shares and interests under the will of the testator; that the case of *Barrymore v. Ellis* (1) could not be relied upon by the other side, since the question there arose upon a deed, and was clearly distinguishable from the present. The testator must have intended this provision to be for her personal benefit, since it was to cease upon her becoming bankrupt or insolvent. This clause against

(1) 8 Sim. 1.

anticipation would also be found to correspond exactly with the form used by conveyancers, and given as a precedent in Jacob's edition of *Roper's Husband and Wife*, vol. 2, p. 402.

Mr. Stuart and *Mr. Simpson*, in support of the bill, were not called upon.

The VICE CHANCELLOR.—In first reading the words in *Barrymore v. Ellis*, I thought the question was, whether the words there were different from these or not, but I see now that they are just the same. I must say, had I been called upon to decide this question at the time I made these observations in *Barrymore v. Ellis*, I should have decided in that way; and though I admit the common form to be in these terms, yet it always appeared to me to be deficient for the purpose of restraining alienation; and I recollect, when I was in the habit of drawing conveyances, and wished to settle property on a lady, over which she was to have no power of anticipation, I used to introduce an express proviso, that nothing should be a receipt to the trustees to discharge them, except a receipt to be given by the wife or her appointees for each dividend as it became payable, and then the trustees could not allow it to be disposed of, when there was a receipt from time to time.

Mr. Bethell.—There are words here requiring a receipt to be given for each dividend: the words are, "for the last-mentioned rents," &c., which are directed to be paid.

The VICE CHANCELLOR.—I think nothing will do unless negative words are introduced, that the receipts of the wife shall not be sufficient discharges, except for what should have become due. Here there are no negative words in the clause, and therefore *Mrs. Bamford* had full power to dispose of or charge the rents and dividends directed to be paid to her separate use. I must say, if any person had asked me long ago upon this point, I should have given the same answer as I now do. If this proposition, in the report of the case of *Barrymore v. Ellis*, had been wrong, there would have been persons who would have appealed against it.

Demurrer overruled.

V.C. }
June 4. } CROFT v. ADAM.

Power, Construction of—Where not executed.

Upon a marriage settlement, certain stock was assigned to trustees to pay the interest to the wife for life, and, subject thereto, the wife to have power to settle any part for the immediate benefit of her daughter by a former husband, or upon her daughter's marriage, with her consent; but if the daughter should not marry and survive the wife, then for the benefit of the daughter, to be a vested interest: but if she should die without being married, in her mother's lifetime, then upon certain other trusts. The daughter married, and died during her mother's life; the mother did not execute the power:—Held, that the daughter's representatives took the entire benefit of the trust monies.

By a marriage settlement, executed previously to the marriage between Sir Everard Home, and Jane Thompson, widow, now deceased, who had at the time of her marriage one daughter, named Amelia Thompson, by her late husband, Jane Thompson assigned to trustees the two several sums of 2,300*l.* and 1,000*l.*, in trust for the separate use of her, the said Jane Thompson, for life; and subject to the separate right and interest of the said Jane Thompson, during her life, in and to the interest and dividends of the said sum of 2,300*l.*, or the stock or annuities wherein or upon which the same or any part thereof shall be placed out or invested, the same sum, stock or annuities, and every part thereof, shall, as and when the said Jane Thompson shall think fit or be advised, be settled upon trust, for the benefit of the said Amelia Thompson, (the daughter and only child of the said Jane Thompson, by the said Stephen Thompson, her late husband,) and of her intended husband, and her child or children, in such manner and for such rights and interests as shall be agreed upon either previous to or after the marriage of the said Amelia Thompson, with the consent and approbation of the said Jane Thompson, her mother; and that the said Jane Thompson shall, by virtue of this settlement, be at free liberty, and have full power and authority to settle the said sum of 2,300*l.*, or any part thereof, or the stock or annuities whereon the same shall

be invested, in trust, for the immediate benefit of the said daughter, and her said child and children, in manner aforesaid, to take effect either upon such marriage, or upon or immediately after the decease of the said Jane Thompson, as she shall think fit, notwithstanding her coverture, and whether married or sole. But if the said Amelia Thompson should not be married in her mother's lifetime, and should her survive, then and in such event the said sum of 2,300*l.*, or the stock or annuities wherein the same shall be invested, shall be upon trust for the benefit of the said Amelia Thompson, and shall be a vested interest in, and assigned or transferred to her, upon her attaining the age of twenty-one years, or on her marriage before that age, as the event shall happen. But if the said Amelia Thompson should die in her said mother's lifetime, without having been married, then and in that event the said sum of 2,300*l.*, or the stock or annuities which shall be purchased therewith, shall be upon the same trusts, and under and subject to the same powers, provisions, and agreements, as were thereafter expressed and declared of and concerning the said sum of 1,000*l.*, or the stock or annuities which shall be then existing or capable of taking effect.

Amelia Thompson intermarried with Sir F. Adam, in the year 1811, at which time a settlement was made of certain property belonging to the intended wife ; but there was no allusion to the sum of 2,300*l.*, nor was Jane Thompson a party to the settlement. Amelia Thompson, then Amelia Adam, died in June 1812, leaving one daughter, A. F. E. J. Adam, who in 1833 married the defendant, Major Boileau, and died shortly afterwards, leaving her husband her surviving, and one child. Major Boileau took out letters of administration to her estate. Sir Everard Home died in August 1832, and Jane Home, his wife, died in May 1841, but did not in any manner during her lifetime execute the power over the 2,300*l.* This suit was instituted for the purpose of obtaining the direction of the Court, as to whether, under the construction of the clause above recited from the settlement of Sir Everard and Lady Home, it was optional for the mother to exercise the power or not ; and whether, upon the non-execution of the power, the funds did not go to her representatives ; or whether

the property was not subject to a clear trust for the benefit of the daughter, and, upon her death, belonged to her representatives.

Mr. Richards and *Mr. Lake Russell*, for the trustees.

Mr. Stuart and *Mr. Bailey*, for Major Boileau, contended that Lady Home was unable to defeat her daughter's interest in the 2,300*l.* ; it was a clear executory trust, and the objects were clearly described ; that as she did not execute the power during her life, the Court must exercise it for her. The clear intention was, that there should be a settlement made upon the daughter, but the exact terms were left to the direction of Lady Home ; she having died without giving such directions, the Court must do so ; and the better plan would be, that the settlement should be drawn as in the case of a ward in court.

Brown v. Higgs, 8 Ves. 561.

Brown v. Pocock, 6 Sim. 257 ; s. c. 4

Law J. Rep. (N.S.) Chanc. 15.

Mr. Romilly, for Sir Frederick Adam.

Mr. Bethell and *Mr. Elmsley*, for the executors of Lady Home.—There never was a case so plainly devoid of the circumstances on which reliance has been placed, in other cases, where the words have been construed either as power, trust, or gift by implication. In no case can it be found that a trust has been held to be created where there was any element of uncertainty ; on the contrary, the object, estate, and quantity, must be definite. No construction could possibly be put upon this settlement by the Court, as the direction was left entirely dependent upon the will of the mother, who did not think fit to exercise that power upon the marriage ; the property and interest, therefore, go to the representatives of Lady Home.

THE VICE CHANCELLOR.—In this case, you must, as in all others, look at the whole of the words together. Now there were three contingencies, and there was a fourth, which is not noticed. As I understand the words, in the first place, there is a provision in the event of a marriage of Amelia, in the life of her mother, with consent. Then, there is a provision for the daughter surviving the mother, without being married ; then follows a provision for the daughter dying

during the life of the mother, unmarried; but there is no provision for the case which happened, of the daughter marrying and dying in the life of the mother. There certainly is a clear intention that an interest should be given to the daughter, and her husband and children, in an event over which the mother was to have controul, that is, marriage with her consent. If the right to take was made to depend upon previous consent, there was no inconsistency in saying, that right should be liable to such modifications as the mother should propose. It is quite plain that you must take all the words together, down to "with the consent and approbation of the said Jane Thompson," to determine who are the parties over whom the power is to be executed. The mother would have had no power, I think, if the marriage had taken place without her consent; but, if she did consent, then she created an interest in the husband and children, which she might, however, modify as she pleased. The words used are altogether inaccurate. The clause continues, after specifying who are to be the objects of the power, to direct, that Jane Thompson shall "be at liberty to settle the property in trust, for the immediate benefit of her daughter, to take effect either upon her marriage, or upon the decease of the said Jane Thompson, as she should think fit." These words have a distinct meaning; for though it is true Mrs. Thompson had power by note under her hand to appoint the dividends, yet this is a power by mere verbal approbation to divest herself of the life interest, and it has this further meaning, that, notwithstanding the trust for the benefit of her daughter, and her children, it gives her power to disappoint them, by means of the modification. The interest is to be modified as the mother pleases, and then a power at once to make a settlement for the immediate benefit of the daughter and her children. I think the best construction will be, inasmuch as the mother exercised no authority whatever, that Sir Frederick Adam is entitled for life; and Major Boileau will take in remainder, as the representative of the only child of Amelia; that is, Sir Frederick Adam will take a limited interest, and Major Boileau an absolute interest.

M.R. }
June 9. } HILTON v. LORD GRANVILLE.

*Costs, Security for, in an Action at Law
—Suspension of Proceedings at Law.*

A. filed a bill against B, to restrain him from working mines in such a manner under A's houses as to cause damage thereto, and an order was made by the Court that a motion for an injunction against B. should stand over till further order, and that A. should be at liberty to bring an action against B, touching the working of the mines, and that B. should, on the trial of the action, admit that the working of the mines had caused damage to the foundations of A.'s houses. A, before plea had been pleaded, died, and C, his son and customary heir, duly revived the suit in this court, and obtained an order that he should be at liberty to prosecute the last-mentioned order, either by continuing the action already commenced by A. against B, or otherwise, by bringing a fresh action in his own name against the defendant, upon the terms of that order. C. having elected to prosecute the action already commenced by A, and the Judge at common law having declined making any order against C, obliging him to find security for costs,—The Court, on application made on behalf of B, ordered the proceedings in the action to be stayed until A. had given security to B, before the Master, for the costs of the action.

In this case, William Hilton in May 1841, filed his bill, praying an injunction restraining the defendant from carrying on any mining works beneath the plaintiff's messuages and lands, in such a manner as to damage the foundation thereof. By an order of the Lord Chancellor, dated the 18th of June 1841 (1), it was ordered, that William Hilton should be at liberty to bring such action against the defendant as he might be advised, touching the working of the mines, and that the defendant should admit, on the trial of such action, that the mining of the defendant had caused damage to the foundations of the houses of William Hilton; and it was ordered, that the motion for an injunction should stand over until after judgment should have been obtained in such action, or until

(1) Vide 10 Law J. Rep. (N.S.) Chanc. 398.

the further order of the Court. An action was accordingly commenced by William Hilton against the defendant in the Court of Queen's Bench, and a declaration was delivered therein, but in December 1841, before the defendant had pleaded thereto, the plaintiff, William Hilton, died. In March 1842, John Hilton, the son and customary heir of William Hilton, filed his bill of revivor, upon which the usual order of revivor was made, and on the 22nd of April 1842, the Court ordered that John Hilton should be at liberty to prosecute the order of the 18th of June 1841, either by continuing and carrying on the action commenced, pursuant to that order by William Hilton against the defendant, or otherwise by bringing a fresh action in his own name against the defendant upon the terms of that order. The plaintiff, John Hilton, elected to prosecute the action commenced against the defendant by William Hilton, deceased, and gave notice thereof accordingly to the defendant. John Hilton having refused to give security for costs in the action, the defendant's solicitor, on the 1st of June 1842, took out a summons before one of the Judges of the Court of Queen's Bench, requiring John Hilton to shew cause why the defendant should not have time to plead after security for costs had been given by John Hilton, when an order was made that the defendant should have ten days' time to plead, but declined to make any order for the security of the costs, and referred the defendant's solicitor to this Court on the subject of security for costs. The defendant then gave notice of motion that John Hilton might be ordered to give security, according to the practice of the Court of Queen's Bench, for all such costs as he might become liable to pay to the defendant, in case he were the plaintiff in the action, and that in the meantime all proceedings in the action might be ordered to be stayed.

Mr. Pemberton, in support of the application, contended, that the defendant would be wholly unable to procure payment of his costs of the action, in case he should be successful on the trial thereof, unless security was given to him for the same, inasmuch as no one appeared on the record liable to pay them, and that this Court never intended, when it made the order, allowing John Hilton to prosecute the

action commenced by William Hilton, to controul the settled practice at common law, with reference to the giving of security for costs.

Mr. Kindersley and *Mr. Hardy*, contra, insisted, that, under all the circumstances of the case, the practice of the Court of Chancery, and not of the court of common law, should be regarded; and that if the defendant should succeed in the action, this Court would order John Hilton to pay the costs of the action at law, if, in the exercise of a fair discretion, it thought such an order just.

THE MASTER OF THE ROLLS.—No reasonable person can entertain a doubt as to what ought to be done when the facts of this case are understood. The bill is filed by William Hilton, against Lord Granville, to restrain him from working certain mines, a motion is made for an injunction, the injunction is not granted or refused, but it is directed that the motion should stand over, and that William Hilton should bring an action in order that the right of the party may be tried, a right depending, according to my recollection of the circumstances, on considerable nicety, and a very important case. William Hilton accordingly brings an action, which was pending at the time of his death; after his death, John Hilton, the present plaintiff, files a bill of revivor, proceeds to prosecute that bill, and then, on the 22nd of April 1842, asks for leave either to continue and prosecute the action already commenced in the name of William Hilton, or to commence a new action. Notice of this application is given, and an intimation signified on the part of Lord Granville to the other party, that he does not intend to oppose the application; the application, not being opposed, is granted, and leave is given to proceed in either of the two forms, and nothing more is granted by the Court. The action was never supposed to be exempt from the ordinary incidents of an action. Now, one of the incidents of an action which is brought by a living person in the name of another is, that there ought to be security for costs. Is it not highly fit that there should be a security for costs? I mean so long as the present rules of all the courts as to costs remain, is it not highly important that there should be some security

given for costs, some person against whom the party may proceed for costs, if there be any occasion? And if there be no person against whom the party can proceed for costs, by reason of the form of the action, then that there should be the only substitute for it, viz. security for costs? It is said, that the defendant in this case ought to have foreseen that an order to be made upon that notice would exonerate John Hilton from giving security for costs. I am of opinion, that he ought not to have foreseen it; that it was by no means a natural or necessary consequence of the order being made, that John Hilton should be exonerated from the payment of costs, if he chose to proceed in that particular form in which the defendant would have no means of obtaining costs except by means of the security; I think that the defendant was perfectly right, not having any intention of opposing the motion, not to appear upon it, nor to make any difficulty on it.

Then the question came before the Judge at common law, and he gave time to plead. Now it may be that in the proceeding on an action, if time to plead is given, the time then may have gone for seeking security for costs. But how was it here? Did the Judge give any opinion that the party was not (having regard to the form of this action and the circumstances under which it was brought) entitled to security for costs? No; he said he conceived he was precluded from considering the question, in consequence of the action being prosecuted by leave of this Court, and, for anything I can know to the contrary, on the present occasion, if he had not entertained that opinion, he would have ordered security for costs to be given. Suppose this to be so; the defendant then comes here, and informs me by this motion that the action is prosecuting in a manner highly disadvantageous for him, for it is a form of action in which the defendant is entitled to security for costs; and he has not obtained it, because the Judge at common law imagined, under the order made here, that he was not entitled to consider that question. It is neither just nor equitable that I should continue the leave to prosecute the action when it is being prosecuted in a manner so unjust.

I have nothing to do with anything else but the order I made; if he prosecutes this

action, it is under the continuance of a leave given him to do so here.

Under these circumstances I am not disposed to continue that leave. The parties must proceed upon just and legal terms, and after that order John Hilton would have had to come again to this Court for an order, and care would then have been taken to set the matter right.

This is, I conceive, an unjust use attempted to be made of the order made by this Court. What is asked here is, that I should compel John Hilton to give security for costs. I think I have authority to make such an order, and to stay the execution of the order already made by the Court, until it is proceeded with in a more proper manner. If the order be discharged, the party will be unable to proceed; and he will not have leave given him to proceed in such action, without first giving security for costs. But I cannot interfere with the order made by the Judge in the action.

The order, as afterwards arranged, with the sanction of the Court, was, that the proceedings under the order of the 22nd of April 1842 be suspended until security for the costs of the action should have been given before the Master.

K. BRUCE, V.C. }
June 22. } BIRD v. BIRD.

Will—Construction.

A testator, by his will, made the following devise,—“It is my will, that the rents and profits of my freehold estate at E. shall be applied, in the first place, towards the maintenance of J, until he shall arrive at the age of twenty-one years, and that the residue thereof shall accumulate until that event, and that, when he shall attain that age, then that the same be paid to him for his benefit, and that after the expiration of the leases subsisting, the freehold shall become the absolute property of J, to hold to him, his heirs, and assigns for ever:”—Held, first, that the fee of the property at E. vested in J, at the death of the testator; and secondly, that the rents of the property between J's attaining his majority and the expiration of the leases belonged to J.

A testator, by his will, made a residuary devise in the following terms:—"I give, devise, and bequeath to trustees, (naming them,) their heirs, executors, administrators, and assigns, all the residue of my estate and effects whatsoever, both real and personal, to hold upon trusts following, that is to say." After disposing of specific parts of the residue, the will proceeded as follows:—"It is my will, that the rents and profits of my freehold estate, situate in the Edgeware Road, upon which new houses are already built or building, to the number of fifty, shall be applied as follows, that is to say, in the first place, towards the maintenance and education of my son James, until he shall arrive at the age of twenty-one years, and that the residue thereof shall accumulate until that event, and that when he shall attain that age, then that *the same* be paid to my son James, to and for his own use and benefit; and it is my will, that after the expiration of all the leases subsisting of all the houses and buildings aforesaid, erected on the said lastly mentioned estate, the freehold shall become the absolute property of my son James, to hold to him, his heirs, and assigns for ever."

The houses mentioned in the will were, at the decease of the testator, let on leases, which had twenty years to run. James survived the testator, attained the age of twenty-one, but died before the leases expired.

It was contended, on the part of the persons interested in the residue undisposed of, first, that James having died before the leases expired, the freehold never vested in him; and secondly, that the rents of the leasehold houses between the time that James attained twenty-one and the expiration of the leases were undisposed of in this clause.

The only case which was cited was *Nash v. Smith* (1).

Mr. Russell, Mr. Anderdon, Mr. K. Parker, Mr. Koe, Mr. Teed, Mr. Roupell, Mr. Heathfield, Mr. Green, Mr. Schomberg, Mr. Campbell, Mr. Ellis, and Mr. F. J. Hall, for different parties.

KNIGHT BRUCE, V.C.—On the first point, I think it so clear, as not to admit of ques-

(1) 17 Ves. 29.

tion, that the fee vested in James on the death of the testator. As to the second point, I have no doubt in my own mind. The legal estate is here vested in trustees, and therefore a court of law would not express any opinion on the points in dispute, unless the terms of the will, in a case sent to them, were altered. In order for a Court, however, to ascertain the testator's intention, I think the very words of the will ought to be before it. I shall not, therefore, send a case to law, but decide the point myself. I think this is a cumbrous and complicated mode adopted by the testator of expressing his opinion, that James should take the whole. I think there is no necessary inference that the words "the same" must be rigorously confined to the last antecedent, if "the residue" be taken to be the last antecedent; and that they might, if the context required it, receive a much larger interpretation. "The same" might be applied to all the rents and accumulations. I have no doubt the testator so intended it, and that he has sufficiently expressed that intention.

K. BRUCE, V.C. }
June 29. } BOSS v. GODSALL.

Settlement — Power to advance Trust Funds to Husband.

By a marriage settlement, trustees were empowered, and were thereby required at any time or times, and from time to time after the marriage and during the life of B, the intended wife, at her request, to lend A, the intended husband, any sum not exceeding 200l., part of the trust funds, on the security of his bond. After the marriage A. took the benefit of the Insolvent Debtors Act, and afterwards B. made an application to the trustees to lend a sum of 87l. to A, on the security of his bond: —Held, that the taking of the benefit of the act had produced such a change in the circumstances of A, that the trustees would not be authorized in making the advance.

This was a suit instituted for the removal of a trustee. By the settlement made on the marriage of Mr. and Mrs. Boss, certain funds, the property of Mrs. Boss, were assigned to the defendant Godsall and another trustee,

upon trust for the separate use of Mrs. Boss for life, without power of anticipation, and, after her decease, upon other trusts therein mentioned. In the settlement was contained the following proviso—"Provided always, and it is hereby further agreed and declared between and by the parties hereto, that it shall and may be lawful for the trustees or trustee for the time being, of the said indenture, and they or he are hereby required at any time or times, and from time to time, after the solemnization of the said intended marriage, during the life of the intended wife, at her request, to be testified by writing under her hand, to advance or lend to the said intended husband, at interest, on the security of his bond and obligation, out of the trust monies hereby settled as aforesaid, any sum not exceeding 200*l*." The trustees were, by the settlement, directed to forbear to call in such sum as might be so lent during such time as they should think fit, unless required by Mrs. Boss; and it was declared, that they were not to be liable for any loss in respect of any such advance so to be made.

The marriage took place in 1837. In 1838, Mr. Boss took the benefit of the Act for the relief of Insolvent Debtors. In 1840, Mrs. Boss made an application in writing to Mr. Godsall, to advance a sum of 87*l*. in his hands, part of the trust funds, to Mr. Boss, on the security of his bond, according to the terms of the proviso, which he declined to do.

The bill was filed by Mrs. Boss; and this and some other acts were relied upon by her, for the purpose of obtaining the removal of Mr. Godsall.

Mr. Simpkinson and *Mr. Elderton*, for the plaintiff.

Sir Charles Wetherell and *Mr. T. Parker*, for Godsall.

Mr. Russell, *Mr. Willcock*, and *Mr. Jolliffe*, for other parties.

KNIGHT BRUCE, V.C.—The first point relied upon for the removal of Mr. Godsall is, his refusal to advance the sum in question; a duty which, it is asserted, he ought to have discharged. When the marriage took effect, the husband was not insolvent, but soon after, he took the benefit of the Insolvent Debtors Act, and afterwards this

application is made to the trustee. I am of opinion, that the fact of Boss having taken the benefit of the act, has produced such a total change in his circumstances and position, that the clause in question lost all effect, and that the trustee was perfectly justified in his refusal.

V.C. }
July 7, 8. } HALFORD v. GILLOW.

Bankruptcy—Jurisdiction of Equity.

Upon motion by a plaintiff who set up claims to a bankrupt's estate, to restrain the assignees from proceeding to distribute the dividends:—Held, that a court of equity could not, in such a case, interfere with the jurisdiction of the Court of Review.

Case of Atkinson v. Plummer, (reported in Eden on Injunctions,) corrected.

In this case a motion was made for an injunction to restrain Messrs. Gillow, Walker, and another, the assignees under a fiat issued against the defendants, Halford, Baldock, and Snoulton, from taking any proceedings in the bankruptcy, in order to the making or declaring (if any) further dividends of the separate estate of Mr. Snoulton under the fiat, and from parting with or distributing such separate estate amongst the creditors who had proved or might prove their debts under the fiat. Upon Mrs. Halford's marriage with the plaintiff in this cause, in 1820, the property to which Mrs. Halford was entitled under the will of her former husband, Mr. Denne, was conveyed to Messrs. Snoulton & Peckham, upon trust, to accumulate the dividends during the minority of Miss Denne, the daughter of the plaintiff by her former husband, after paying the premiums upon certain policies of assurance which were agreed to be effected. Miss Denne came of age in 1836, and up to that time the trustees, instead of accumulating the dividends, had allowed Mr. Halford to receive the income, which amounted to above 24,000*l*. To indemnify the trustees against this breach of trust, Mr. Halford assigned to them the policies of assurance, so directed to be effected and kept on foot under the settlement, amounting to 20,000*l*. This bill was filed against

the assignees and trustees of the settlement for the recovery of the sum improperly received by Mr. Halford, and that the policies might be sold and applied in part satisfaction of the breach of trust, and to prevent the assignees under the fiat from distributing the separate estate of Snoulton until the plaintiff's claim should be ascertained.

Mr. Richards and *Mr. Lloyd*, for the motion, said, there was no dispute upon the facts; the only question was, whether a breach of trust had been committed by the trustees in carrying out the trusts of the settlement. It was evident the Court of Review was incompetent to deal with the whole question. The assignees could not be entitled to apply any portion in payment of the joint creditors. An objection had been raised, that the Court of Review, in all matters relating to the bankrupt's estate, had exclusive jurisdiction. In this case, it could not act so as to decide the whole question, as it could not deal with the equities between the parties:—

Glascott v. Lang, 3 Myl. & Cr. 451.

Clarke v. Capron, 2 Ves. jun. 666.

Eden on Injunctions.

Ex parte Garland, 10 Ves. 110.

Bromley v. Goodere, 1 Atk. 75.

Hankey v. Garret, 1 Ves. jun. 236.

Treves v. Townshend, 1 Bro. C.C. 384.

Atkinson v. Plummer, *Eden on Injunctions*, 298.

Mr. Bethell and *Mr. Ellison*.—No application of this nature was ever granted by a court of equity. The Court could never tie up the whole of the bankrupt's estate upon a question of proof only: this Court can have nothing to do with the administration of a bankrupt's estate. The commissioners were bound by the act of parliament to declare a dividend, and the Court of Chancery has no power over these commissioners—*Cooke's Bankrupt Law*. The only way to obtain the object here sought, would be to restrain the commissioners from doing that which they are bound to do—to distribute the assets amongst the creditors. This application can be made nowhere except to the Court of Review.

Ex parte King, 11 Ves. 417.

Ex parte Keys, 1 Mont. & Ayr. 226.

NEW SERIES, XI.—CHANC.

The VICE CHANCELLOR said he should read through the papers before he decided this question.

The VICE CHANCELLOR subsequently said, —I have read through these papers, and I think that the plaintiff has no interest whatever in the policy of assurance, unless she could effect an equity through the indemnity deed. It appears to me, that this is the same point as that which I had to consider in the case of *Bridges v. Branfill* (1). Unless she can work it out by means of the indemnity deed, she certainly has no interest in the policies. The money was to be received on them; and then the trusts are worked out in such a manner, as to give her no interest whatever; therefore, as to that fund, she certainly had none. I think she may sustain the bill against the assignees in some respects; but the question is, whether I can interfere in a suit instituted, like the present, to prevent the assignees making a dividend. Here her only claim on the surplus estate is the general claim of a creditor; she does not claim anything which is separate money belonging to herself. I think this Court has no jurisdiction to prevent the assignees from distributing the funds of a bankrupt's estate *simpliciter*. The assignees are, to some extent, officers of the Court, which is to declare how the dividends are to be paid. The act of parliament directs them to pay to the creditors, in which this Court could not interfere. If it were a question how far any personal assets or other species of property, which was in the hands of the assignees, formed part of the bankrupt's estate, this Court would settle the question; because the jurisdiction of bankruptcy is only on what is actually the bankrupt's estate, but not to determine what that estate is. When it is determined what the estate is, the whole of it falls within the jurisdiction of that court. None of the cases cited shew this Court has ever interfered to prevent the assignees making a dividend of what is the bankrupt's estate. I am of opinion, I have no jurisdiction to grant the motion, and no authority in respect of it; therefore the motion must be refused; but as there is some appearance of authority in favour of it, I shall not give the costs: the costs of the assignees to

(1) 10 Law J. Rep. (N.S.) Chanc. 14.

be costs in the cause. The authority I allude to is in the passage which occurs in *Eden's book on Injunctions*, p. 298, which is this:—"An injunction may be granted on the application of a plaintiff in a bill for an account against a bankrupt, to restrain the assignees from making a dividend till the account has been taken." I recollect giving a note of that case to Mr. Eden, for I was myself counsel in the cause. A mistake, however, seems to have been made by him in what I said. I have now had the decree in the case copied from the registrar's book. It is this:—

Atkinson v. Plummer, 5th of August 1811. *Reg. Lib.* (A) 1810, fol. 1466—"His Lordship doth order that the defendants Thomas Plummer, John Smith, and James Woodbridge, be at liberty to make the present dividend of 1s. in the pound, under the commission of bankruptcy issued against Henry Mure, Robert Mure, and William Mure, of the estate and effects of the said bankrupts—but this is to be without prejudice; and it is ordered that the said defendants be restrained from making any future dividend of the produce of the Saxham and Caldwell estates under the said commission, without the leave of this court."

M.R. }
May 25. } BARON DE FEUCHÈRES v. DAWES.

Administration—Receiver—Practice—Demurrer—9th Order of 1833.

While proceedings were pending in the Ecclesiastical Court between the husband of a deceased lady and her next-of-kin, respecting the right to administer to her estate, the husband filed a bill against the next-of-kin, praying for a receiver pendente lite; and also, that upon the appointment of a personal representative, and upon his being brought before the Court, the rights of all parties might be ascertained, and the estate administered by the Court. A demurrer to the latter part of the relief asked for, was allowed.

A defendant who resides out of the jurisdiction, cannot obtain a commission to take his answer abroad, in the mode pointed out by the 9th Order of 1833, that order applying only to cases where the defendants are within the jurisdiction.

The bill stated a settlement which was executed on the marriage of the plaintiff, the Baron de Feuchères, with his late wife, Sophia, Baroness de Feuchères, and by which the property of the parties was brought into community; that the plaintiff's wife died domiciled in England, and he claimed to be entitled, by survivorship, to all her personal property, and to have administration granted to him of her goods, credits, and effects. The bill also stated some proceedings which had taken place in France, respecting a divorce; and it also stated, that litigation was then going forward in the Ecclesiastical Court, between the plaintiff and the defendants, respecting the right to administration to the estate of the deceased Baroness, the defendants claiming as her next-of-kin. The bill prayed, that pending the proceedings in the spiritual court, the personal estate and effects of the said Sophia, Baroness de Feuchères, might be secured by this Court, and that a receiver thereof might be appointed by the order of this Court, with directions to get in the outstanding estate of the said Sophia, Baroness de Feuchères, and that the same might be paid into court, and invested and secured; and that the defendants might be restrained by injunction from receiving and intermeddling therewith. The bill then prayed, that upon the appointment of a legal personal representative of the said Sophia, Baroness de Feuchères, and upon such representative being brought before the Court, the rights of all parties to the said estate of the said Sophia, Baroness de Feuchères, might be ascertained, and declared, by and under the order and decree of this Court; and that the same might be applied in a due course of administration.

The defendant answered part of the bill, but demurred to so much of it as asked, that upon the appointment of a legal personal representative of the Baroness de Feuchères, and upon such representative being brought before the Court, the rights of all parties to the estate of the baroness might be ascertained and declared, by and under the order and decree of the Court, and that the same might be applied in a due course of administration.

Mr. Kindersley and Mr. Glasse appeared in support of the demurrer, and contended, that the matters which were in dispute be-

tween the parties would be settled by the decision of the Ecclesiastical Court; and that if the defendant answered this part of the bill, which was demurred to, great expense would be occasioned by going into evidence respecting it, which the defendant was anxious to avoid, by putting in a demurrer.

Mr. Pemberton and *Mr. Beavan* appeared for the plaintiff, and insisted, that the only point which would be decided by the Ecclesiastical Court, would be the right to administration, leaving the question as to any beneficial interest untouched; that the questions which arose in the suit respecting the French divorce, and the domicile of the Baroness, would not be affected by any decision of the Ecclesiastical Court; and that if this demurrer was allowed, it would only render an additional suit necessary to settle those questions, which were raised by that part of the bill to which the demurrer applied.

Mr. Kindersley replied.

THE MASTER OF THE ROLLS.—This bill has two objects: first, to protect the property during the litigation in the Ecclesiastical Court, till the appointment of a legal personal representative. That object has been attained, and is by no means objected to. The second object is to have the rights of the parties to the property determined, after the legal personal representative should be appointed. The rights of the parties—what parties? Persons not now known—not now existing; there being no means of knowing whether those persons, when they are appointed legal personal representatives, and possessed of the property, will distribute it lawfully or not; whether they will make any resistance whatever to the demands which may be made on it—that is now totally unknown. If the fate of this demurrer depended on the question, whether the right to the property could be determined by a determination of the right to the legal personal representation; whether it would not, after that matter has been decided, become necessary to have it discussed here, and not necessary to have all the evidence that may be gone into, for the purpose of ascertaining who the parties are, I think, then, that this demurrer would certainly not succeed. But it does not depend on that. The question

is, whether it is not now asking for something which this Court cannot grant, against parties not known now to exist—not existing now, because their character has not been determined; and in the absence of any information whatever, whether, when the Ecclesiastical Court has appointed the administrator, the administrator will refuse to administer the estate in a manner in perfect conformity with the rights of all the parties. It may be quite necessary, after all, to go into all the evidence which the parties now are desirous of going into, or it may be necessary to have an adjudication of those rights; but the necessity for doing that does not now in any degree appear, and I think that this demurrer is right. The demurrer must be allowed (1).

One of the defendants, who resided abroad, (in France,) sued out without any special order, but under the 9th Order of 1833, a special commission to take the plea, answer, or demurrer of the defendant, on giving two days' notice to the plaintiff's clerk in court, to give commissioners' names. This notice was disregarded by the plaintiff; and a demurrer and answer was taken in France, by the commissioners named by the defendant alone. A motion was now made on behalf of the plaintiff, that this demurrer and answer might be taken off the file for irregularity.

Mr. Pemberton and *Mr. Beavan*, supported the motion; and

Mr. Kindersley and *Mr. Glasse* opposed it.

Daniell's Prac. in Chanc. vol. 2, p. 283. was cited.

THE MASTER OF THE ROLLS was of opinion, that the 9th Order of 1833 did not apply to the case of a defendant residing out of the jurisdiction; and he therefore granted the application.

(1) In *Lowe v. Farlie*, 2 Mad. 105, Sir T. Plumer says, "Pending a litigation for probate, a bill may be filed for an account and a receiver; but this is an excepted case."

K. BRUCE, V.C. } ATTORNEY GENERAL v.
June 25. } DIXON.

Charity—Lease—Costs.

The trustees of a charity, being entitled to, and claiming, the great tithes only of the parish of W, granted a lease of the great and small tithes of W. to B, who had full notice of this circumstance, and who in substance contracted for the great tithes alone. B. assigned this lease to C, who had full notice of the particulars of the contract with B. C. having refused to pay the rent, an action was brought against him for it by the charity, to which C. pleaded eviction of the small tithes. The action was tried, and the jury apportioned the rent in respect of the value of the small tithes. Upon an information filed against C:—Held, that C. was liable to pay the full rent from the assignment of the lease, and either to give up the lease, or retain it upon payment of the full rent for the future. The charity was held not to be entitled to costs, on the ground that the small tithes had been improperly inserted in the lease.

The trustees of Sir John Hawkins's Hospital at Chatham had been in the habit of granting leases of the great and small tithes of East Wickham ever since the reign of Queen Elizabeth. The hospital was entitled to the great tithes, but it had either no right to the small tithes, or that right had not been enjoyed or exercised for a long time; and, in granting leases, it had been always understood by the lessee, that the great tithes alone were the subject of the contract. In 1830 the hospital granted to Mr. Smith a lease of the great and small tithes, at the annual rent of 160*l.*, which lease in 1832 was duly assigned to the defendant Dixon. After Dixon had been in possession about a year, he refused to pay to the vicar of Plumstead, who was in the enjoyment of the small tithes of East Wickham, a composition for the small tithes due in respect of a farm he held in the parish; and the vicar, having brought an action, recovered damages to the amount claimed. Dixon then refused to pay the rent to the hospital, and, to an action brought in respect of it, pleaded that he had been evicted of the small tithes which had been demised to him by the lease. The action was tried,

and the value of the small tithes having been proved to be 80*l.* a year, the jury apportioned the rent accordingly, and found that the annual rent due in respect of the lease was 80*l.* only. An information was filed in 1840 by the Attorney General against Dixon and the trustees of the hospital, stating the facts as given above, and stating also various circumstances to shew that both Smith and Dixon had notice, and knew that the hospital had in fact no right to the small tithes, and that the great tithes alone were the object of bargain, and claiming that either Dixon should pay the whole rent, or that the lease should be given up.

The circumstance of notice and knowledge were proved in the cause. The defendant stated in his answer, and proved several letters which had passed between himself and the agent for the hospital, by which it appeared that the agent had recognized his right, as lessee, to the small tithes. It was for this reason that the trustees of the hospital had been made defendants.

No rent had been paid to the hospital since 1834, and it was admitted that 80*l.* was an inadequate rent for the great tithes.

Mr. Boteler and *Mr. Sandys*, for the Attorney General, contended, for the reasons above given, that the full rent of 160*l.* ought to be paid in respect of the lease. If, however, this relief was not to be given, as it was a common equity that improvident leases granted by a charity might be set aside at any time, and as 80*l.* was admitted to be an improvident rent, the hospital was clearly entitled to have the lease delivered up.

Mr. Simpkinton and *Mr. Koe*, for the defendant Dixon, relied on the words of the lease and the letters above mentioned.

Mr. Wray, for the hospital.

Knight Bruce, V.C.—It being admitted that 80*l.* would be too low a rent for the great tithes, it is impossible that the lease can stand at that rent. The defendant, Dixon, must therefore have his choice,—either to give up the lease on payment of the rent from the time of the filing the information, or take the lease, and pay the full rent from the time of the filing the information to the present time, and for the future. This disposes of one part of the

case. The only point left is, the rent that is to be paid from 1834 to the time of the filing the information.

The Vice Chancellor then offered Mr. Simpkinson an inquiry as to the circumstances under which Smith and Dixon had taken the lease of the great and small tithes, and whether it was substantially their intention to have given the rent of 160*l.* for the great tithes alone.

[*Mr. Simpkinson* declined the inquiry.]

KNIGHT BRUCE, V.C.—As Mr. Simpkinson has declined the inquiry, I must take it for granted that Smith took his lease with notice of the claims of the vicar to the small tithes, and that Dixon, when he took the assignment of the lease, had also full notice of such claims; and that it was substantially the intention of Smith and Dixon at the commencement to claim no more than the great tithes. The case stands thus: A lease is granted by the corporation, in which several subjects are included to which the corporation has no claim. The lessee is entitled, after eviction, or after circumstances tantamount to eviction, to an apportionment of rent. This is quite clear. But if, in fact, it should be that the lessee knew fully that the lessors had not such rights, that they never claimed a title to more than the great tithes, that this was all the time well understood by all parties, that the party contracting for the lease contracted for no more than the great tithes, that the person who adopted the contract had no more in his view, it is impossible in such a case to allow an apportionment of rent. This also is clear upon ordinary principles. The lessee has what he has contracted for, and is not entitled to more. The full rent, then, must be paid from the year 1834 to the date of the information. As to costs, I think the hospital ought not to have inserted the small tithes in their lease. It appears to me that it was done by way of asserting a continual claim, of keeping alive a right against the vicar. This is not an accurate or proper way of doing business. I shall not therefore fix the defendant Dixon with costs; but I wish it to be understood, that it is not approbation of his conduct, but want of approbation of the conduct of the hospital, that induces me to take this course.

The defendant Dixon to pay the full rent from 1834 to the time of the filing the information; and, the defendant consenting to take the lease, to pay full rent from the time of the information. No order as to costs as far as relates to the defendant. The costs of the Attorney General to be paid by the hospital.

M.R. }
July 7. } MACKENZIE v. CLARIDGE.

Practice.—Demurrer—34th Order of August 1841.

Where a demurrer had been filed, and not set down by the plaintiff within the time allowed by the 34th Order, the plaintiff was ordered to pay the defendant's costs.

A demurrer was filed to this bill, which was not set down by the plaintiff, within the time allowed by the 34th Order of August 1841, and the plaintiff was therefore held to have submitted to it.

Mr. Bacon, for the defendant, now asked for an order that the plaintiff should pay the defendant's costs of that proceeding.

The MASTER OF THE ROLLS ordered, that the plaintiff should pay the costs, as if the demurrer had been allowed by the Court.

M.R. }
July 7. } JEWIN v. TAYLOR.

Practice.—Taking Bill off the File.

The bill allowed, under particular circumstances, to be taken off the file.

A petition was presented by the plaintiff, asking for leave to take the bill off the file, the dispute between the parties being settled.

Mr. Bacon supported the petition, and cited *Tremaine v. Tremaine* (1).

The MASTER OF THE ROLLS made the order.

(1) 1 Vern. 189.

M.R. }
July 20. } MEYER v. MONTRIOU.

Settlement—Trustee—Breach of Trust.

A bill was filed by parties interested, under a marriage settlement, alleging that part of the trust fund had been improperly sold out, and lost. The trustee admitted the sale, and did not state how the funds had been afterwards invested:—Held, that the plaintiffs were entitled to a decree, requiring the trustee to make good the fund which had been sold out; and that the defendant, the trustee, was not entitled in the first place to an inquiry whether the funds had been properly invested.

This suit was instituted for the purpose of making the trustees of a marriage settlement liable for a breach of trust.

By the settlement made on the marriage of John Meyer, with Margaret, his wife, certain funds were vested in trustees, upon trust, for the husband, wife, and children of the marriage. The settlement contained a power, with the consent of the husband and wife, to call in the trust monies, and invest them in government or mortgage securities, or in the purchase of freehold, copyhold, or leasehold estates.

The bill alleged, that the principal part of the trust funds had been improperly sold out of the Bank, under a power of attorney, executed by the three trustees, and had been lost; and prayed, that the trustees might make good the loss.

The answer of Montriau admitted the selling out of the trust funds, under a power of attorney, given by him and his co-trustees, and stated some of the dealings with different parts of the fund, but did not shew on what securities the whole of the monies had been invested, or whether on securities warranted by the settlement.

Mr. Pemberton and Mr. Hetherington asked for a declaration of the liability of the trustees to make good the fund.

Mr. Kindersley, for *Mr. Montriau*, contended, that such a declaration was premature, and that there ought to be a previous inquiry as to the investment of the funds.

Mr. Campbell and Mr. E. F. Smith appeared for other parties.

The MASTER OF THE ROLLS said, that where a trustee admitted the trust fund to have been sold out, and converted from a proper state of investment, and failed to shew that it was properly re-invested, he was liable, in the first instance, to have a decree made against him. Here the trustee admitted that the fund had been sold out, but could not say whether any part was now properly invested. It must therefore be declared, that he was liable to make good the fund sold out.

M.R. }
July 20. } HOWELL v. GAYLER.

Settlement—Legacy—Construction.

By a marriage settlement, one moiety of the trust fund, which consisted of navy 5l. per cent., standing in the names of trustees, was directed to be paid (in the events which happened), after the death of the survivor of the husband and wife, to such person as the husband should, by deed or will, appoint, and in default of appointment, to his executors, administrators, or assigns. The husband died in the lifetime of his wife, having by his will bequeathed all the money he might have in the books of the Governor and Company of the Bank of England to certain parties, and having bequeathed the residue of his estate to his wife absolutely:—Held, that the widow was entitled to the husband's moiety of the settled fund.

On the marriage of William North with Mary Burghope, a sum of 1,000l. navy 5l. per cent. stock, which belonged to the latter, was vested in trustees, in trust, to pay the dividends to Mary Burghope for life, and after her decease, to pay the dividends of a moiety to William North for life; and after the decease of the survivor of them, in trust, to pay one moiety as Mary Burghope should appoint; and in default, to the executors or executor of her will; and in default, to the children of the said Mary Burghope, as therein mentioned; and for default of such children, to such person or persons of the blood and kindred of the said Mary Burghope as by law should be entitled to the administration or distribution of her personal estate in case she had died sole and intestate, equally among them; and as to

the other moiety, to pay it to William North absolutely, in case he should survive Mary Burghope; but if Mary Burghope should survive William North (which happened), then, upon the decease of Mary Burghope, to assign and transfer it to such person as the said William North should, by deed or will, appoint, and in default of such direction, limitation, or appointment, then unto the executors, administrators, or assigns of the said William North.

The marriage took effect, and the question in the cause arose as to the second moiety under the following circumstances.

William North died in 1829, and his wife died in 1841. William North executed no appointment of the fund; but by his will he gave the whole of the money he might have in the books of the Governor and Company of the Bank of England, and also all the money he might have at the time of his decease in the Hertfordshire Savings Bank, in trust for his widow for life, with remainder to other persons; and he gave the residue of his estate to his widow absolutely.

This bill was filed by the administratrix of Mary North, claiming a moiety of the fund as residuary legatee under her husband's will.

Mr. Pemberton and *Mr. Bagshawe*, for the plaintiff, cited *Graffey v. Humpage* (1).

Mr. Campbell, for a trustee, and also for one of the next-of-kin of William North, contended that the next-of-kin, and not the residuary legatee, took under the above limitation—*Palin v. Hills* (2). He also cited *Horseman v. Abbey* (3).

Mr. R. W. Moore contended, that either the fund belonged to the next-of-kin or passed under the will of William North, as "money which he had in the books of the Governor and Company of the Bank of England." He cited *Bethune v. Kennedy* (4), to shew that the gift of the stock was specific.

Mr. Pemberton, in reply.—The money was not money which the testator had in the bank at his death, as it was standing in

the names of trustees, and was subject to the life interest of the wife.

The MASTER OF THE ROLLS said, there were many cases on the subject; but he thought, on the words of the settlement, that the plaintiff was clearly entitled. He ordered the costs of all parties to be paid out of the fund, and the residue to be paid to the plaintiff.

See *Stocks v. Dodsley*, 1 Keen, 325.

Collier v. Squire, 3 Russ. 467; s. c.

5 Law J. Rep. Chanc. 186.

Price v. Strange, 6 Mad. 161.

Bridge v. Abbot, 3 Bro. C.C. 224.

Wellman v. Bowring, 1 Sim. & Stu. 24;
s. c. 1 Law J. Rep. Chanc. 27.

K. BRUCE, V.C. } HUMPFREYS v. ROBINSON.
July 23.

Practice.—Opening Biddings.

The biddings allowed to be opened, as to an estate sold in eight lots for different sums, amounting to 300l., on an advance of 120l.

An estate was sold, in pursuance of a decree, in eight lots, for different sums, amounting to 300l.

Mr. Dixon moved, that the biddings might be opened upon an advance of 100l. on the 300l. He cited *Brookfield v. Bradley* (1).

Mr. Cankrien, contra, said, the Court would not allow the biddings to be opened upon a less advance than 40l. a lot.

KNIGHT BRUCE, V.C. allowed the biddings to be opened at 400 guineas.

K. BRUCE, V.C. } ELLIOTSON v. KNOWLES.
July 29.

Practice.—Decree.

A court of equity will not make a declaration of right, except as incidental to relief given—semble.

In 1816, an estate was settled to such uses as Miss Magrath should appoint. In 1830, Miss Magrath married Mr. St. John. In February 1831, an indenture was exe-

(1) 1 Sim. & Stu. 23.

(1) 1 Beav. 47; s. c. 8 Law J. Rep. (N.S.) Chanc. 98.

(2) 1 Myl. & K. 470; s. c. 2 Law J. Rep. (N.S.) Chanc. 142.

(3) 1 Jac. & Walk. 381.

(4) 1 Myl. & Cr. 114.

cuted, by which, after reciting an agreement, previously to the marriage, to settle this estate, it was witnessed, that in pursuance of the agreement, Mrs. St. John appointed the estate to herself for life, with remainder to her husband, with remainder to the children of the marriage.

In 1833, Mrs. St. John appointed this estate, by way of mortgage, and by an indenture, dated April 1840, this mortgage was transferred to the plaintiff, with a new proviso for redemption, on payment to the plaintiff of the principal sum and interest in April 1841.

In June 1840, the plaintiff filed his bill, praying that it might be declared that the settlement ought to be set aside as being voluntary, and therefore void against his mortgage, and that it might be set aside accordingly.

Knight Bruce, V.C. dismissed the bill, on the ground that, as the time of payment had not arrived, the plaintiff had no right of foreclosure, and his remedy, with respect to the settlement, was at law.

The case was now brought on again on a petition of rehearing.

Mr. Cooper, for the plaintiff, urged, that the bill ought not to be dismissed.—The plaintiff was entitled in this suit to a declaration, that the settlement ought to be delivered up, even though no relief should be given consequential on that declaration. In *Simpson v. Lord Howden* (1), Lord Cottenham held, that a court of equity would not order an instrument, which, on the face of it, was illegal, to be delivered up. This instrument is not illegal on the face of it. A voluntary settlement, which, at the time of its execution, is voidable, may by after circumstances become unimpeachable. He was stopped by—

Knight Bruce, V.C., who observed, that he had heard Lord Cottenham say, that a court of equity would not make a declaration of right, except as incidental to relief given. This remark, he understood from an authority on which he could entirely rely, had been made repeatedly by Lord Cottenham. This had always been his own view on this

(1) 3 Myl. & Cr. 97; s. c. 6 Law J. Rep. (N.S.) Chanc. 315.

point. Mr. Cooper's argument had not imbued him with any doubt. He thought he had better stop the case for this reason—if he, the Vice Chancellor, were to decide it, there might be a great difficulty in getting the case heard on appeal before the Lord Chancellor, and the plaintiff could only resort to the House of Lords.

[It was agreed, that the Vice Chancellor should not decide the point, and that the case should be set down before the Lord Chancellor, as an appeal from his Honour's decision, when the cause was first heard.]

K. BRUCE, V.C. } STRATHMORE v. STRATH-
June 13; Aug. 1. } MORE.

Witness—Demurrer to Interrogatory.

A demurrer to an interrogatory by a witness, on the ground of privileged communication, ought to contain a distinct allegation of the confidential relation between the witness and the party from whom he derived his information.

Liberty given to amend a demurrer.

When a demurrer to an interrogatory by a witness has been overruled, the witness will be ordered to pay the costs.

A demurrer to an interrogatory was put in by a witness.

The interrogatory required the witness to state, whether he was not secretary of the Globe Assurance Company, and to set out various particulars relating to contracts entered into by the company.

The witness said that he was secretary to the society, and demurred to the remainder of the interrogatory.

The demurrer was in this form—"The witness saith, that as confidential officer of the Globe Assurance Company, he is not obliged to answer the remainder of the interrogatory, and demurs thereto."

Mr. Goldsmid, for the demurrer.

Mr. Lovat, contra.

Knight Bruce, V.C. said, he thought it was necessary that there should be a distinct allegation in the demurrer that the witness was a confidential officer; for, though he had stated so on his examination, he (the Vice

Chancellor) was not able to look at it, as it had not been published. Ordered, that the demurrer should stand over for a fortnight, and that the witness should be at liberty to attend before the examiner, and amend his demurrer.

This demurrer was not mentioned again.

In the same cause another demurrer was put in by another witness to an interrogatory, and overruled by the Vice Chancellor.

Mr. Lovat applied to the Court, that the costs of the demurrer should be paid by the witness who had demurred. He stated, that this was in accordance with the practice which had been inquired into; and

KNIGHT BRUCE, V.C. ordered the costs to be paid by the witness accordingly.

K. BRUCE, V.C. }
May 28, 30. } CONSETT v. BELL.

Parties—Administration Suit—Deed of Gift.

An instrument was executed in 1835, by which A. conveyed to B. all and singular the household furniture, silver plate, watches, china, glass, monies, and securities for money of A, which should, at the time of the decease of A, be situate and lying in and upon two particular rooms in the mansion of A. A, by his will, dated in 1837, bequeathed all his plate, jewels, household furniture, and effects whatsoever in this mansion to trustees, upon certain trusts. A. died in 1839. B, who was the confidential agent of A, gave no explanation of the deed of 1835, and did not allege or set up any consideration for it. Whether the instrument of 1835 was testamentary, quære;—but held, that, considering it as a deed inter vivos, it would not be aided in equity; and, if it had effect at law, a court of equity would not allow it to stand.

The executors of a testator, three days after his death, paid a sum of money, part of the testator's estate, to B, in satisfaction of an alleged claim by B. on the testator. B. had full notice that, by so doing, the executors were acting hastily and improvidently, and not in discharge of their duty:—Held, that in a suit by a person interested under the will

of the testator, for the administration of the estate of the testator, B. might be made a party, without any allegation of collusion or insolvency.

A person appointed by the will of a testator receiver of his real estate, with a salary, is a proper party to a suit for the administration of that estate.

The bill was filed by W. W. Consett, the tenant for life of the real and personal estate of Peter Consett under his will, against the trustees and executors of the will, the other persons interested in the estate, and Mr. Benjamin Wilson; and the object of the suit was to have the estate of the testator administered, and to recover from Wilson the sum of 846*l.*, alleged to have been improperly received by him under the circumstances hereafter stated. The right of Wilson to retain this sum was the only point in the case that presented any difficulty.

The testator, who was entitled to real property producing about 3,000*l.* a year, lived at Brawith Hall, in Yorkshire, and was a gentleman of retired and eccentric habits. The defendant, Wilson, was bailiff or general manager of the property of the testator. The testator occupied only two rooms in the Hall, one of which was called the bed-room, and the other the workshop. It was the habit of the testator, when he received his rents, to deposit the bills and notes in an iron chest which stood in the bed-room, and the gold and silver in a bureau which was in the workshop.

By an indenture dated the 26th of September 1835, and made between the testator of the one part, and Wilson of the other part, it was witnessed, that in consideration of the services performed by the said B. Wilson for the said P. Consett, and in further consideration of 10*s.* paid by the said B. Wilson to the said P. Consett, the said P. Consett bargained, sold, assigned, transferred, and set over unto the said B. Wilson, his executors, administrators, and assigns, all and singular the household furniture, silver plate, watches, clocks, time-pieces, china, glass, printed books, monies and securities for money, and other effects of what nature or kind soever, of the said P. Consett, which, at the time of his decease, should be situate and lying in and upon the rooms in his dwelling-house, then oc-

cupied by him at Brawith aforesaid, commonly called or known by the names of, and occupied by him as his bed-room and workshop (save and except a certain iron chest, then standing and being in the bed-room aforesaid, and its contents, and also saving and excepting the contents of a certain closet, situate in the workshop aforesaid, commonly called or known by the name of the "plate closet"), and all the right, title, interest, property, benefit, claim, and demand whatsoever of him, the said P. Consett, in, to, and upon the said effects and premises : to have, receive, and take all the said household furniture and other effects and premises thereinbefore mentioned and intended to be thereby assigned unto him, the said B. Wilson, his executors, administrators, and assigns, for his and their own absolute use and benefit, without any lawful let, suit, denial, claim, demand, interruption, and eviction whatsoever, of, from, or by any person or persons whomsoever claiming or to claim by, from, through, under, or in trust for him, the said Peter Consett, his executors or administrators, or by, with, or through his or their or any of their act or acts, means, consent, privity, or procurement.

This deed, soon after its execution, was delivered by the testator to Wilson. The deed, which had been attested by a tailor and a grocer, was proved by them in the cause. It was stated, that it had been prepared by a solicitor, who was then deceased. This was all the evidence that was produced by Wilson as to the preparation and execution of the deed.

It did not appear that the services rendered to the testator by the defendant in the ordinary course of his duty as bailiff or manager were gratuitous, and no special services or consideration for the deed were set up or suggested by him.

The testator made his will, bearing date the 27th of July 1837, and thereby, after devising his real estate as therein mentioned, gave and bequeathed to certain persons, whom he also named executors, all his plate and jewels, and all the household furniture and utensils of every description, which, at the time of his decease, should be in and about the mansion-house at Brawith Hall, upon trust, to permit the same to be held by the persons to be successively entitled

to his real estate in the nature of heir-looms. The testator also directed that Wilson should be the receiver of the rents and profits of all his freehold, copyhold, and leasehold hereditaments for the term of twenty-one years, if he should so long live, and that his receipts should be discharges to the tenants, and that he should have a salary of 100*l.* a year.

The testator died on the 7th of December 1839. A female servant deposed, that on the 5th of December, when the testator was lying ill in bed, the defendant Wilson brought to the bedside two canvas bags, which contained the rents he had received that day, and that the testator then told him to deposit them in the bureau. She also stated, that the testator had, very shortly before, said that every thing in the two rooms, except the plate chest and iron chest, belonged to Wilson. Some other evidence as to declarations of the testator, to the same effect, since the date of the will, was adduced by the defendant.

The bags were in the bureau at the death of the testator. On the 10th of December, the executors delivered the money and notes which were in the bureau and in the two rooms (other than in the iron chest), and which amounted to the sum of 846*l.*, to the defendant, in the presence and with the consent of their solicitor, upon the production of the deed of gift. On the 20th of the same month, they demanded this sum back of him, on the ground of having erroneously given it to him.

The plaintiff confined his claim to the money, the rest of the property being of trifling value.

Mr. Wigram and *Mr. Willcock*, for the plaintiff.—First, the instrument in question is testamentary—

Ousley v. Carrol, cited in *Ward v. Turner*, 2 Ves. sen. 440;

Habergham v. Vincent, 2 Ves. jun. 231;

Masterman v. Maberly, 2 Hagg. Ec. Rep. 235;

and being testamentary, it was revoked by the will, which was dated subsequently. At any rate, no effect can be given to it unless it be proved. Secondly, since property which may belong to a person subsequently to the date of a deed, cannot at law be passed by that deed, this instru-

ment is inoperative as a conveyance at law of the property in question ; and, as there is no consideration, equity will not give effect to it. Thirdly, allowing it to be a deed, and a deed passing the property at law, since it is a deed of gift by a donor to a person standing in a confidential relation to him, this Court will not, as the matter now stands upon the defendant's evidence, permit it to have any effect. It lay upon the defendant satisfactorily to explain the whole transaction, which he has failed to do.

Bridgman v. Green, 2 Ves. sen. 627.

Huguenin v. Baseley, 14 Ves. 273.

Griffiths v. Robins, 3 Madd. 191.

Popham v. Brooke, 5 Russ. 10 ; s. c.

6 Law J. Rep. Chanc. 184.

Hunter v. Atkins, 3 Myl. & K. 113.

Dent v. Bennett, 4 Myl. & Cr. 269 ; s. c.

8 Law J. Rep. (n.s.) Chanc. 125.

Mr. Russell and Mr. Stevens, for the defendant Wilson.—First, the bill is multifarious. Secondly, as this is a suit for the administration of the estate of the testator, Wilson, having no interest in that estate, has been improperly made a party to the suit. Thirdly, whatever may be the rights of the plaintiff to the sum in question, he cannot enforce them in this suit. If Wilson has improperly received this money, he is a debtor to the testator's estate. Now, in order to entitle a plaintiff to make a debtor a party to an administration suit, and keep him before the Court, he must charge and establish collusion between this debtor and the executors, or the insolvency of the executors.

Beckley v. Dorrington, cited in *Alsager v. Rowley*, 6 Ves. 749 ; s. c. West

Rep. temp. Hardwicke, 169.

Bowsher v. Watkins, 1 Russ. & M. 277.

There is no insolvency here suggested ; and there is in fact no doubt the trustees and executors are perfectly solvent. There is no charge of collusion between the executors and Wilson. The executors, with full knowledge of all the circumstances, and acting under the advice of their solicitor, deliberately paid the money to the defendant. If there be any collusion at all, it is between the plaintiff and the trustees. For these reasons the bill ought to be at once dismissed against Wilson.

Mr. Swanston, Mr. Mylne, Mr. Heberden, and Mr. Sandys, for other parties.

[With reference to the second point made by the defendant Wilson, that he was improperly made a party to the suit, his Honour observed, that under the clause in the testator's will, by which he was appointed receiver, he had an interest in the testator's real estate, and that he was properly made a party on that ground—*Shaw v. Lawless*, 5 Cl. & Fin. 129.]

KNIGHT BRUCE, V.C.—The first objection is, that the bill is multifarious. I am not bound to accede to that objection. At this stage of the cause, it is in my discretion whether to allow it or not ; and, without deciding the point, whether the bill is or is not multifarious, I do not allow the objection. It is then said, that Wilson is not a necessary or proper party. I need not enter into this point, as he is clearly a proper party on the other ground I have mentioned before. As to the instrument in question, it may be of a testamentary character ; if so, I cannot act upon it, as it has not been proved. If Wilson pleases, he may tender it for probate, and, when this is done, the Court can deal with it, but not before. If it be not of a testamentary character, has this instrument any legal or equitable validity as to the 84*l.* ? As to any validity in equity : there is no reason to suppose that Wilson's services were gratuitous, or not remunerated, or that the testator was in any manner bound to execute the deed, or that the testator was indebted to Wilson. It is therefore a purely voluntary settlement, and not to be aided in this court. As to its legal validity, I am of opinion that it does not operate as a covenant, or assignment, or pass any interest at law. If it were material to have the effect of it at law decided, it might be right to send a case to a court of law ; but I do not think this would be of any advantage to Wilson. There is here no trace of good advice. The instrument is a singularly improvident one, and obtained by a confidential agent from a principal, without advice, and has been produced without any explanation. I am of opinion with Lord Eldon and Lord Cottenham, "that those who meddle with such transactions, take upon themselves the whole proof that the thing is righteous"—*Dent v. Bennett*. This duty Wilson has not discharged. It is impossible on general princi-

ples, and the peculiar circumstances of this case, to allow this deed to have any effect. Wilson then contends that the sum in question cannot be recovered in this suit, and that he does not come within the exception to the rule laid down in *Beckley v. Dorrington*. This objection I cannot accede to. Wilson obtained possession of the money within less than a week after the death of the testator, with the assent of the executors, having notice of the will, notice that the executors had acted hastily, improvidently, and not in the proper discharge of their duty. Suppose that the plaintiff is clearly entitled to the money, why should I render further litigation necessary? Without displacing the doctrine laid down by Lord Hardwicke, and acted on in numerous cases, I must hold that Wilson is liable to pay the money in this suit; and I think this quite consistent with that doctrine.

The defendant Wilson to pay into court the sum of 846*l.*, with 4*l.* per cent. from the time of filing the bill. Wilson not to pay or receive any costs up to the present time.

K. BRUCE, V.C. } WHITMARSH v. ROBERT-
July 5. } SON.

Baron and Feme—Power of Advancement.

By the marriage settlement of A. and B, a sum of stock was settled upon B, the intended wife, for life, with remainder to the children of the marriage in the usual way, and the trustees were thereby authorized at any time during the lives of A. and B, and the survivor of them, in case they, he or she should so direct, to advance a portion of the trust fund for the benefit of the children of the marriage. There were several children of the marriage. A. died; B. married C; C. assigned the life interest of B. in the fund to D. for valuable consideration. Whether by virtue of a direction from B. to the trustees, specifying the sums to be raised by way of advancement, and proper objects for such advances, the trustees would be authorized to raise and apply such sums accordingly—quære.

In this case, whether the dividends during the joint lives of C. and B, or during the life of the wife, passed to D—quære.

By the marriage settlement of Mr. and Mrs. Finlayson, it was declared, that trustees should stand possessed of the sum of 1,700*l.* 3*l.* per cent. consols, which had been transferred into their names, upon trust, to pay the dividends for the separate use of Mrs. Finlayson during the life of Mr. Finlayson, and after his decease to pay the same to Mrs. Finlayson for life, and after her decease, to divide the principal among the children of the marriage.

In the settlement was contained the usual power, by which the trustees were authorized at any time or times after the decease of Mr. and Mrs. Finlayson, or in the lifetime of them, or the survivor of them, in case they, he, or she should so direct by any writing under their, his, or her hands, to levy or raise such part, as therein mentioned, of the expectant or vested portion of any child or children for his, her, or their advancement or benefit.

There were several children of the marriage, all of whom were infants at the hearing of the cause.

In the early part of 1837, Mr. Finlayson died, and Mrs. Finlayson soon after married the defendant, Mr. Mileham.

By an indenture dated in July 1837, Mr. and Mrs. Mileham, in consideration of 450*l.* assigned to the plaintiff Whitmarsh, all the dividends to accrue due on the stock during the life of Mrs. Mileham. The trustees having declined to pay the dividends to Mr. Whitmarsh, the bill was filed by him against the trustees, Mr. and Mrs. Mileham, and the infants, for the purpose of obtaining a direction by the Court for such payments.

After the sale to the plaintiff, Mrs. Mileham sent a paper to the trustees, to the effect, that she requested them to make advances to the children out of the trust fund; but neither the sum nor the specific object of the advance was mentioned. This paper was proved in the cause.

Mr. Russell and Mr. Stinton appeared for the plaintiff:

Mr. Wigram, for Mr. and Mrs. Mileham: and

Mr. Welford, for the children.

Mr. James Parker, for the trustees, raised two questions, which, he submitted, must qualify any decree of the Court in favour of the plaintiff;—first, as Mrs. Mileham's

execution of the assignment was totally inoperative, whether this assignment passed the dividends to accrue during her life, or only those during the joint lives of herself and Mr. Mileham. The only authority on this point was a dictum of Lord Cottenham in *Stiffe v. Everitt* (1); secondly, whether the marriage with Mr. Mileham and the assignment to the plaintiff extinguished or suspended the power given to Mrs. Mileham by the settlement, to direct advances to be made by the trustees out of the capital to the children.

Mr. Russell, in reply, contended, that where there was an interest coupled with a power, if the interest was conveyed away, the power was extinguished. There was no difference in this respect between a power to appoint generally, and a power to appoint among a particular class — *Noel v. Lord Henley* (2).

Knight Bruce, V.C. said, he would pay no attention to the paper which had been produced. There was no sum specified to be raised, and no object, such as the marriage of a daughter or the apprenticing of a son, suggested. As to the question whether under the present circumstances Mrs. Mileham could direct advances to be made to the children, he thought it open to very considerable argument: it had often struck him as one of the *res dubiæ* of the law: but he certainly should not express any opinion on it, unless the point were properly raised, and he was compelled to decide it. There was another question, whether a life interest in a fund, or an annuity, to which a married woman was entitled, was to be considered as an entire chattel, and therefore liable to be passed by the assignment of the husband, or whether the interest only for the joint lives of husband and wife could be affected by him. Both these questions he should leave open.

Declare that the dividends should be paid to the plaintiff during the joint lives of the husband and wife, or until further order.

(1) 1 Myl. & Cr. 37; s. c. 5 Law J. Rep. (N.S.) Chanc. 138.

(2) M'Clel. & You. 302.

M.R. }
July 2. } KENDALL v. GRANGER.

Legacy—Charitable Bequest.

A testator bequeathed the residue of his estate to trustees, to be by them applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility:—Held, that the trustees had the option of applying the fund to purposes not charitable, and that the bequest was consequently void.

William Kendall, by his will, dated the 25th of October 1830, after certain legacies, devised and bequeathed all the residue of his estate, both real and personal, to Frederick Granger and John Squance, their heirs, &c., upon trust, to sell, and to pay to each of the six daughters of his brother, who were plaintiffs in this suit, 400*l.*; and he directed that the remaining surplus monies should be at the disposal of the said Frederick Granger and John Squance, to be by them applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility, in such mode and proportions as their own discretion might suggest, irresponsible to any person or persons whomsoever; provided only, that should any difference or differences of opinion occur as to the application or distribution of any part of such surplus, then the said testator directed that such differences, as they might arise, should be submitted by his trustees to the judgment of Edmund Pollexfen Bastard, and that his decision should be binding and conclusive on the subject in controversy. And the said will stated it to be the said testator's express wish and intention, that if practicable, the whole of such surplus monies should be distributed and disposed of within three years after his decease.

The testator died in March 1832, leaving his six nieces before-mentioned, and their brother, who was the first named plaintiff on the record, his next-of-kin, and leaving the first-named plaintiff his heir-at-law.

The bill was filed against Mr. Granger and Mr. Squance, for the purpose of obtaining a declaration that the bequest of the surplus of the testator's estate was void.

Mr. Kindersley, Mr. Flather and Mr. Terrell, appeared for the plaintiffs:

Mr. Pemberton and Mr. Swinburns, for the defendants, and

Mr. Wray appeared for the Crown, without requiring the Attorney General to be made a party.

The following authorities were cited—

Morice v. the Bishop of Durham, 9 Ves. 399.

Williams v. Kershaw, 5 Cl. & Fin. 111; s. c. 5 Law J. Rep. (N.S.) Chanc. 84.

Ellis v. Selby, 1 Myl. & Cr. 386; s. c. 5 Law J. Rep. (N.S.) Chanc. 214.

James v. Allen, 3 Mer. 17.

Vezey v. Jamson, 1 Sim. & Stu. 69.

48 *Eliz.* c. 4.

THE MASTER OF THE ROLLS.—The question is, whether this is a will, the trusts of which make it obligatory on the trustees to apply the fund to charitable purposes. This is not a question whether the trustees may apply it to charitable purposes, but whether they are bound to do so. The decisions go to this, that there must be no option between charitable purposes and other purposes. It might be either those purposes which are nominally charitable, or purposes such as the Court construes to be charitable, by analogy to the purposes stated in the statute. Difficulties arise from the vagueness in the language. There is no charitable purpose which is not benevolent; yet, a trust for *benevolent* purposes, is held not to be charitable, because there are some benevolent purposes which the Court cannot hold to be charitable purposes. So in the word "liberality," which is still perhaps more vague.

In this case, the direction is to apply this fund "for the relief of domestic distress," &c. I confess, in my view, this is a charitable purpose; for it is to relieve domestic distress, and it would be a charitable purpose, because of the word "indigent." But there is a discretion to "encourage undertakings of general utility." Charitable purposes may, I consider, very well be purposes of general utility. A question seems to me to arise in this way: cases of benevolence are all cases of general utility; but the term "general utility" is so large, that it comprehends purposes which are not charitable; and comprehending those purposes which are not charitable, there is an option for the

trustees to apply the fund to purposes not charitable; and this, therefore, takes it away from those purposes which would make the Court interfere. I am not wholly satisfied with all the decisions which have taken place upon these points. I think there are cases in which, when there are charitable purposes, the Court would require the fund to be applied to them. But I think this trust is not one which can be carried into effect, as a trust for charitable purposes.

re Norton & Hattett v. 9 & 10 Feb 56/

V.C.

July 12. }

COOKE v. CRAWFORD.

Trusts for Sale—Devise of Estates by Trustee and Heir-at-law.

A testator devised his estates to three trustees, upon trust that they or the survivors or survivor of them, or the heirs of such survivor, should as soon as conveniently might be after his decease, but at their discretion, sell his said estates. Two of the trustees disclaimed; the third, who was the testator's heir-at-law, proved the will, but died without having sold the estates; by his will he devised and bequeathed all estates vested in him as trustee to the plaintiffs, upon the trusts affecting the same; the plaintiffs contracted to sell the estates:—Held, upon bill for specific performance, that the trustee and heir of the original testator, who accepted the trusts, was not authorized in devising estates which devolved upon him as trustee, and that his devisees had no power to execute the trust for sale.

William Hall (the elder), late of Fosdyke, being seised of an estate of fee simple in Fosdyke, made his will, dated the 7th of April 1836, and thereby devised to his son, William Hall (the younger), and his friends J. Burkitt and W. Woolley, "all his messuages, lands, hereditaments, and real estates in Fosdyke aforesaid, or elsewhere in the said county of Lincoln, with their appurtenances; upon trust, that his said trustees, or the survivors or survivor of them, or the heirs of such survivor should, as soon as conveniently might be after his decease, but at their discretion, sell all the said real estates and hereditaments, either by public auction or private contract, and either altogether or

in several parcels, for such price or prices as they should consider the value thereof." And for the purpose of effectuating any and every such sale, he thereby authorized and empowered his said trustees and their heirs to make, enter into, and execute all necessary contracts, conveyances, or other assurances to or in favour of the purchaser or purchasers of such estates respectively, his, her, or their appointees, heirs or assigns; and he declared, that the written receipt or receipts of the said W. Hall the younger, J. Burkitt and W. Woolley, or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, should be a sufficient discharge to the purchaser or purchasers respectively of any of his said real estates, to be sold by virtue of his said will, for the purchase-money thereof, or for so much thereof as in such receipt or receipts should be expressed, or acknowledged to be or to have been received; and that such purchaser or purchasers thereof should not afterwards be obliged to see to the application of such purchase-money, or be accountable for the loss, mis-application, or non-application of the same, or of any part thereof. And he declared and directed, that his said trustees, their heirs, executors or administrators, should hold and be possessed of the money arising, and to be produced from and by such sale or sales of his said real estates as aforesaid, upon the several trusts thereafter mentioned concerning the same; and he gave unto the said W. Hall, the younger, J. Burkitt and W. Woolley, all his personal estate (except as therein excepted), upon trust, that they or the survivors or survivor of them, or the executors or administrators of such survivor, should as soon as conveniently might be, after his decease, at their discretion, call in all such sums of money due to him, and convert into money the residue and remainder of his said personal estate, and should hold such money and proceeds therefrom arising, upon the trusts and for the purposes thereafter mentioned; and he thereby directed his said trustees, their heirs, executors, administrators, and assigns, to hold the proceeds arising from the sale of his said real and personal estate, or otherwise, after payment of the costs incurred in such sale or sales as aforesaid, and also after payment thereof of all his funeral and testamentary expenses, and the costs incurred in the execution of his will, and of

all just debts, upon the trusts therein mentioned. He then appointed W. Hall, the younger, J. Burkitt, and W. Woollett, executors of his will. The testator died in April 1836.

J. Burkitt and W. Woolley declined acting in the trusts of the will, and executed a deed-poll renouncing the trusts thereof, and the will was duly proved by W. Hall, the younger, the heir-at-law of the testator, who took upon himself the execution of the trusts. None of the estates of the testator were disposed of during the life of W. Hall, the younger, who made his will in March 1841, and thereby devised and bequeathed all the estates vested in him as a trustee, unto the plaintiffs, their heirs, executors, administrators, and assigns, upon the trusts affecting the same respectively, and he also appointed the plaintiffs executors of his will. W. Hall, the younger, died in April 1841, and his father's estates were, by virtue of the power given to the plaintiffs by his will, put up to sale by auction, and were purchased by the defendant, who paid a deposit thereon.

The defendant afterwards refused to complete the purchase, alleging that the plaintiffs, as devisees under the will of W. Hall, the younger, could not execute the trusts for sale contained in the will of W. Hall, the elder, and could not make a good title to the property, without the concurrence of the parties beneficially entitled to the purchase-money under the will of W. Hall, the elder. The plaintiffs filed their bill for specific performance of the contract, charging that they were able to make a good title to the hereditaments and premises, without the concurrence of any other person.

Mr. Stuart and *Mr. J. Parker*, for the demurrer, contended, that the plaintiff could not exercise the power of sale contained in the will of Mr. Hall, the elder; that it was a personal confidence which could not be held to extend to the heir or his devisee. If a trust could be executed by a devisee, so could it be by any person to whom the legal estate might be conveyed—*Bradford v. Belfield* (1).

Mr. Richards and *Mr. Jebb*, contra, cited *Adams v. Taunton*, 5 Mad. 435.

Cole v. Wade, 16 Ves. 27.

The VICE CHANCELLOR.—The sole question is, whether a person to whom no authority is given may execute a trust. It is clear, from the decision in *Hawkins v. Kemp* (2), which has been confirmed by subsequent decisions, that the law is certain that where three persons are named to execute a trust, and two renounce, the remaining one may execute alone; here the trust is to be executed by the trustees, or the survivors or survivor of them, or the heirs of such survivor, as soon as conveniently might be. I admit that trustees and their heirs are in fact the same thing; there is no mention of the word "assigns" in that portion of the machinery, which is to effect the sale, other than in the direction to place out the money on mortgage. When the heir-at-law thought proper to devise the legal estate he had, he did what he was not authorized to do; and I enter a protest against this, that heirs should be at liberty to devise estates which devolve upon them as trustees. I have always had the conviction, that it was not lawful for the party to whom the trust estate had devolved to devise it. I do not see the difference between a conveyance during life, and this sort of *post mortem* conveyance. If such a conveyance as this were lawful, a conveyance during life would also be so. It appears to me, after the decision in *Bradford v. Belfield*, which has always been acquiesced in, that I am bound by it; but also, there is the decision in *Townshend v. Wilson* (3), which is binding upon the point. I therefore think, that these devisees of the heir-at-law are not the persons to execute the trust.

Demurrer allowed.

V.C. }
June 24. } AYLES v. COX.

Creditors' Suit—Evidence.

A decree may be obtained in a creditors' suit, for a reference to the Master to take the usual accounts of the personal estate, and of the debts of an intestate, without entering into evidence to prove the plaintiff's debts; notwithstanding the bill may pray a sale of the intestate's real estate, and the heir-at-law of the intestate may be an infant; the form of the decree being, that the plaintiff shall be at

(2) 3 East, 410.

(3) 3 Mad. 261.

liberty to exhibit an interrogatory to prove his debt.

This was a creditors' suit, and the bill prayed that the usual accounts might be taken of the debts and personal estate of Anthony Cox, the intestate in the pleadings named, and if necessary for a sale of his real estate. The intestate died on the 2nd of March 1842, leaving the defendant Charlotte Cox, his widow, who administered to his estate on the 21st of April 1842, and three infant children, him surviving, who had severally put in their answers to the plaintiff's bill, but no evidence had been gone into, and the cause now came on for hearing on bill and answer.

Mr. S. Miller, for the plaintiff, said, it was very important that no time should be lost in proceeding with a sale of the intestate's real estate as speedily as possible; and in order that the inquiries might be proceeding before the Master as to the personal estate at the same time that the evidence necessary to bind the infant heir was being taken before the Examiner, he asked for a decree to take the usual accounts as to the debts and personal estate of the intestate, with liberty to exhibit an interrogatory to prove the plaintiff's debt, and cited *Seton on Decrees*, p. 364.

Mr. Boyle, for the executor.

The VICE CHANCELLOR said, as the administratrix admitted by her answer, that she believed some debt to be due to the plaintiff, he would make the decree as asked.

K. BRUCE, V.C. }
July 11. } PINNOCK v. RIGBY.

Practice.—Substituted Service.

Service on the solicitor of a party, who had concealed himself for the purpose of avoiding service, not allowed to be taken to be good service on that party.

On the 18th of May, E. B. Rigby and others filed a bill, for the purpose of establishing a deed of appointment of a fund by a person deceased, against the plaintiffs, who were interested in this fund in default of appointment. E. B. Rigby retained Mr.

Serrell to act as his solicitor, and Mr. Smith as his clerk in court in this suit.

On the 25th of June the plaintiffs filed a bill against E. B. Rigby, and others, for the purpose of setting aside this deed.

The solicitor for the plaintiffs, by his affidavit, stated, that he was unable to find E. B. Rigby, and that he believed that E. B. Rigby had concealed himself for the purpose of avoiding the service of the subpoena. He then set out at detail several attempts to find him, and several circumstances from which those inferences might be reasonably drawn.

Mr Cooper now moved, on the part of the plaintiffs, on this affidavit, that service of the subpoena on Mr. Serrell or Mr. Smith might be taken to be good service on E. B. Rigby.

Kinder v. Forbes, 2 Beav. 503; s. c. 9

Law J. Rep. (N.S.) Chanc. 288;

Weymouth v. Lambert, 3 Beav. 333, and the authorities cited in those cases, were referred to.

KNIGHT BRUCE, V.C. said, that upon the authorities as they then stood, he should decline making the order. He required the authority and sanction of the Lord Chancellor as to the practice in such matters, before he should make such an order as that now sought.

L.C. }
February. } RICHARDS v. PLATEL.

Practice.—Reversal—Consequential Order.

Where papers upon which a lien is claimed had been delivered up, pursuant to an order upon petition at the Rolls, pending an appeal upon which that order was ultimately reversed:—Held, (reversing the order of the Master of the Rolls,) that restitution of the papers should be ordered upon motion and affidavits. Such a motion is independent, and is not open to any objection, upon the ground, that an order upon petition cannot be varied by motion.

The circumstances of this case appear in 10 *Law J. Rep.* (N.S.) Ch. 375; s. c. 1 *Cr. & Phil.* 70. After the decision of Lord Cottenham, which is there reported, the defendant Platel moved at the Rolls, that the policies which, pursuant to the former

Rolls order, had been delivered up to the plaintiffs, might be restored, in accordance with the reversal of that order by Lord Cottenham. The Master of the Rolls refused that motion, with costs.

The motion was now renewed before the Lord Chancellor.

Mr. Bethell and *Mr. Anderdon*, in support of the motion.—The Master of the Rolls first doubted the jurisdiction, but afterwards, while admitting it, declined to interfere. An argument made below was, that the only remedy was an action.

The LORD CHANCELLOR called upon the other side.

Mr. Richards and *Mr. Tennant*, contra.—The policies were not ordered by Lord Cottenham to be re-delivered.

[The LORD CHANCELLOR.—No; because he did not know—regularly, at least—that they had been delivered. That was “supplemental matter” in his Lordship’s own words. I now know, that pending the appeal to Lord Cottenham, the plaintiff enforced the Rolls order. It is said, that Platel should therefore have amended the petition which he had presented. That was one course which he might have adopted, but I do not think he was precluded from proceeding upon the old petition.]

There is a difficulty in point of form. The first order of the Master of the Rolls was upon petition. The second application, upon which this is an appeal, was by motion. It is only an order upon a petition of course, that can be varied upon a motion. It would be to vary the practice for centuries, if any order is made—*Bishop v. Willis* (1). Lord Cottenham said, upon this very point, “I can give you no relief as to the supplemental matter, unless you bring it before me by supplemental petition” (2).

The LORD CHANCELLOR.—I cannot enter into the merits. It seems to me that this is an independent motion, not seeking to vary an order upon petition, but to carry into effect Lord Cottenham’s order, and to prevent it from being nugatory. I must grant this motion, with costs of the application at the Rolls, but not of the present appeal.

(1) 2 Ves. sen. 113.

(2) There was a difference in the recollection of counsel as to what passed before Lord Cottenham; and it was denied, on the part of Platel, that he used the expression quoted.

L.C. }
 June 7, 8. } HERRING v. CLOBERY.

Practice.—Costs—Fees to Counsel—Attachment.

An attachment issued against a party for the non-payment of costs which had been taxed by the Master. It appeared that part of the amount certified by the Master to be due, consisted of fees to counsel, which had not been paid till after the Master's certificate had been granted. Under these circumstances, the attachment was set aside, and it was referred back to the Master to review his taxation.

The plaintiff in this suit had been ordered to pay certain costs. The bills of costs had been taxed by the Master, who had allowed some fees which had not been paid to counsel at the time the Master's certificate was obtained, although the signature of counsel was produced, as evidence of the fees having been paid. The fees were afterwards paid.

The plaintiff did not pay the bill of costs; and an attachment issued against him in consequence.

A motion was now made on behalf of the plaintiff, that the attachment might be set aside.

Mr. Tinney and Mr. Wakefield appeared in support of the motion, and—

Mr. Bethell and Mr. Anderdon, opposed it.

The LORD CHANCELLOR discharged the attachment, with costs, and referred it back to the Master to review his taxation.

V.C. }
 April 22; }
 June 24. } SOUTH v. WILLIAMS.

Legacy—Release of Debt.

A testator gave his residuary estate in moieties to his son, and to his daughter, who had married C. Williams, and directed that certain sums of money owing to him by C. Williams, should be allowed in account as part of the share of his daughter in his residuary estate. The daughter died in the lifetime of the testator:—Held, that the death of the daughter did not affect the legacy, but that C. Williams was released from his

debts to the amount of moiety of the testator's residuary estate.

John Breach, by his will, dated the 31st of January 1835, gave and bequeathed all the residue of his personal estate to Thomas South and Thomas Robson, upon trust to convert the same into money, and after directing his trustees to pay thereout all his just debts, &c., he continued, "And after payment thereof, in trust for my son P. J. Breach, and my daughter Susan Elizabeth Williams, in equal proportions, as tenants in common, and not as joint tenants, but subject, as to the respective shares of my said son and daughter, to the declaration hereinafter contained; and whereas, on the dissolution of the partnership between my son P. J. Breach and my son-in-law Charles Williams, I advanced to my said son the sum of 500*l.*, as a consideration for his quitting the partnership concern; and whereas, my said son P. J. Breach is also justly indebted to me in the sum of 306*l.* 1*s.* 3*d.*, upon his bond, bearing date the 25th of March 1832, payable with interest; now I do hereby declare and direct that the said several sums of 500*l.* and 306*l.* 1*s.* 3*d.*, or so much thereof respectively, as shall be owing to me at the time of my decease, shall be deducted from the share of my said son P. J. Breach, of my said residuary estate, but that no interest due, or to become due, in respect of either of the said principal sums, shall be demanded from, or paid by him, my said son; and whereas, upon the marriage of my said son-in-law, the said Charles Williams, with my said daughter Susan Elizabeth, I gave and paid to the said C. Williams, the sum of 1,000*l.*, as a marriage portion with my said daughter, and my said son-in-law, the said C. Williams, is also justly indebted to me in the sum of 2,256*l.* 1*s.* 3*d.*, upon his bond, bearing date the 25th of March 1832, and also in the further sum of 1,500*l.*, on his bond, bearing date the 20th of December 1834: now I do hereby declare and direct that the said sum of 1,000*l.*, so paid to the said C. Williams, as a marriage portion, and also the said two several sums of 2,256*l.* 1*s.* 3*d.* and 1,500*l.*, with any interest that may be due or become due on the said sum of 1,500*l.*, but exclusive of any interest (which shall not be demanded from or paid

by the said C. Williams) on the said sum of 1,000*l.* and 2,256*l.* 1*s.* 3*d.*, or either of them, or so much thereof respectively as shall be owing to me at the time of my decease, shall be taken or allowed in account, as part of the share of his wife, (my said daughter Susan Elizabeth) of my said residuary estate; and in case the balance shall appear to be against the said C. Williams and Susan Elizabeth his wife, then I request and direct my trustees and executors to refrain from putting in force the aforesaid bonds, or either of them, against the said C. Williams, and also to refrain from calling for, or enforcing immediate payment of all or any part of such balance, but to require and take from the said C. Williams, such security, real or personal, for the payment thereof, with lawful interest, by instalments, at such periods, and in such manner as my said executors, in their discretion, shall think fit; but, nevertheless, upon the terms that the said C. Williams, his executors or administrators, do and shall secure and assure the payment of the interest of such balance, by equal half-yearly payments, upon the trusts, and for the purposes of this my will; and I appoint the said Thomas South and Thomas Robson, joint executors of this my will."

At the death of the said testator, P. J. Breach and Charles Williams continued indebted to him in the sums mentioned in the will, with a considerable arrear of interest. The testator's daughter, Susan Elizabeth Williams, died after the date of the will in the testator's lifetime.

The bill was filed by the trustees, for the purpose of carrying into effect the trusts of the will, and it stated, that the defendant, Charles Williams, claimed to treat the provision in the will, touching the debt due from him to the testator, as amounting to a legacy or a release to himself thereof, and to have remained unaffected by the death of his wife, and under such circumstances, insisted on a right to retain such debt. On the other hand, the defendant P. J. Breach, and the defendants, the children of Susan Elizabeth Williams, alleged, that the provision insisted on by the defendant Charles Williams, amounted only to a legacy to his wife, and lapsed by her death, and that the same became undisposed of, and was distributable as in a case of intestacy, amongst the next-

of-kin of the testator; and further, that the defendant Charles Williams claimed to be released by the will of the testator, from liability to interest, upon the principal money so owing from him to the testator, during the testator's lifetime, while the other defendants claimed to treat him as liable thereto.

Mr. Bethell and *Mr. Romilly*, for the defendant Charles Williams, cited—

Hills v. Wirley, 2 Atk. 605.

Oke v. Heath, 1 Ves. sen. 135.

Elliot v. Davenport, 1 P. Wms. 83.

Mr. Stuart and *Mr. F. Bayley*, for the children of Charles Williams.

Mr. J. Bailey, for the defendant P. J. Breach.

Mr. Wakefield and *Mr. Goodeve*, for the trustees.

The VICE CHANCELLOR.—Although it is perfectly true that the primary object of the testator, was an equal division of the residue of his personal estate, as between his son and his daughter, yet it appears to me impossible not to see that he did intend a certain benefit to the son-in-law, and that benefit was to be had in this manner. A recital is made of a particular amount of debt due from the son, which, to a certain extent, is released from the effect of the law. That is not very material. I am not bound to consider, as regards the son, what was the effect of that; but then, with respect to the son-in-law, notice is taken, that the testator had paid to him 1,000*l.* on the marriage. The language is very precise, that the son-in-law was indebted to him in one sum stated, and also in the further sum of 1,500*l.* on his bond. He recites that that is the case, and then he says, "it shall be taken or allowed in account, as part of the share of his wife, in my residuary estate; in case the balance shall appear to be against the said Charles Williams and Susan Elizabeth his wife, then I request and direct my trustees and executors to refrain from putting in force the aforesaid bonds, or either of them;" by which, I understand he means this, that an equation shall be struck between them, on one side the quantity of debts due from the son, and on the other, that sum which would be composed of the 1,000*l.* advanced upon the marriage of the son-in-law, and of the other

two sums which were due on the son-in-law's bond; and when the equation is made, the trustees shall no longer put in force the aforesaid bonds. It is quite plain, the testator was perfectly aware of what he was about; "they shall no longer put in force the aforesaid bonds, or either of them, against the said Charles Williams," which is a personal direction in effect, that he shall be released from the bonds, but they are "to refrain from calling for, or enforcing immediate payment of all or any part of such balance, but to require and take from the said Charles Williams such security, real or personal, for the payment thereof, with lawful interest, by instalments, at such periods, and in such manner as my executors in their discretion think fit." It directly, therefore, operates to change the nature of the debt, which was due from Charles Williams, the son-in-law, to the testator; for the operation will be, first of all, to determine what it is that shall ultimately be payable from him; that is one thing: next to declare that the two bonds he had given, shall not be enforced at all: and thirdly, that for so much as, upon the striking of the balance, shall be determined to be due, such security shall be given, real or personal, as the executors may determine upon, and which they could not have done without the direction of the testator; and, therefore, my opinion is, that the death of the daughter during the lifetime of the testator, has made no difference with respect to that part of the transaction.

Declare that Charles Williams is absolutely released from the interest due at the death of the testator on the sum of 2,256*l.* 1*s.* 3*d.* And declare as between the estate of the testator and Charles Williams, the said C. Williams is released to the amount of the debts due from him to the testator, at his decease, to the extent of the amount or value of one moiety of the residuary estate of the testator, to be ascertained in the manner hereinafter expressed.

L.C. }
June 25. } NEWBOLD v. THORPE.

Practice.—8th Order of August 1841.

An order made by the Court under the 8th Order of August 1841, need not be served on the defendant.

Application had been made to the Vice Chancellor Knight Bruce, under the 8th Order of August 1841, that the plaintiff might be at liberty to enter appearance for some of the defendants who had neglected to appear to the bill. The Vice Chancellor Knight Bruce made an order on the 21st of June 1842, authorizing the plaintiff to enter an appearance for the defendants at the expiration of twenty days, if the defendants did not enter an appearance within that time; and his Honour ordered that a copy of this order (of the 21st of June) should be served upon the several defendants within a fortnight.

Mr. Wright, on behalf of the plaintiff, moved before the Lord Chancellor, that the latter part of the Vice Chancellor's order might be discharged; and contended, that service of an order which was made in pursuance of the 8th Order, was not necessary, and ought not to be required.

The LORD CHANCELLOR granted the application.

M.R. } ATTORNEY GENERAL v. THE
July 12. } CORPORATION OF WISBEACH.

Devise—Charity—Corporation.

*A testator devised to the corporation of W. a house, the rent of which he took to be 40*l.* a year and better, and directed one-half the revenue to be applied to increase the school-master's salary, and the other half for the poor of the town; and the overplus he gave to the trustees, and to repair the house. The corporation sold the house to redeem the land-tax on all their real estate:—Held, that the corporation were liable to make good the amount of stock purchased to redeem the land-tax with the money arising from the sale; and that payments which the corporation had regularly made of an amount equal to the land-tax redeemed, but less than the amount of the dividends on the stock, were not sufficient.—Held also, that the charity was entitled to the whole income arising from the trust property.*

John Crane, by his will dated the 26th of June 1651, devised as follows:—"I give to the town of Wisbeach, wherein I was born, my house or inn there standing in the

Market Hill, known or called the Black Bull, with the oil mills thereto belonging, barn, stables, shops, oil-house, and all thereto belonging: the one-half of the revenue to amend the schoolmaster's wages of the free school, and the other moiety to be laid out at the best time of the year to buy corn and firing to be given to the poor of the same town about Christmas or New Year's day. This is to be done by the ten men corporate of the town of Wisbeach, or six of the best men in that town. I take the rent to be 40*l.* a year and better. The overplus I give to ten men, or others appointed for the doing thereof, and to repair the house as they see cause, desiring them they use the tenant well as I have done."

The testator died in the year 1654.

In 1802, the corporation sold these premises for 1,642*l.* 9*s.*, part of which sum, namely, 1,590*l.*, they invested in the purchase of 2,271*l.* 8*s.* 6*d.*, 3*l.* per cents., for the redemption of the land-tax on these premises, and their other property, and the remainder (after payment of costs and expenses) they paid over to the town bailiff of the corporation.

In 1666, upon the inclosure of Wisbeach High Fen, an allotment of eight acres was made to the corporation in respect of these premises, which allotment now produced a rent of 8*l.* per annum.

The corporation paid in respect of this charity, the following sums yearly—59*l.* 6*s.*, the amount of the land-tax which they redeemed; 8*l.* the rent of the allotment; and 2*l.* 18*s.* the dividend on 96*l.* 15*s.* 2*d.* stock in the 3*l.* per cents., amounting together to 70*l.* 4*s.* The master had always received 20*l.* per annum, and the surplus was given to the poor.

The information prayed that it might be declared, that the charity was entitled to the whole of the said sum of 2,271*l.* 8*s.* 6*d.* 3*l.* per cent. consols, or to have transferred to them a sum of stock equal to the said 2,271*l.* 8*s.* 6*d.* 3*l.* per cent. consols, and was entitled to the whole of the interest and dividends thereof; and that the said corporation might be decreed to account for and make good to the said charity the whole amount of the difference between the sums actually and properly paid, and applied by them to and for the purposes of the said charity in respect of the dividends of the said stock,

and the full amount of such dividends which had accrued due, for or in respect of such last-mentioned stock since the purchase thereof as aforesaid.

The information was filed against the corporation, the master of the school, and the trustees who had been appointed under the Municipal Corporations Act.

The corporation of Wisbeach consisted of "ten men of the better, more honest and discreet burgesses of the said town, being householders."

The corporation stated in their answer, that the house devised by Crane had been subject to the land-tax, and that the owners of that house had been liable to repair the wharf or river-wall in front of it; but that the corporation had sold it free from those burthens, and they claimed a compensation on these grounds, in case the Court should require them to make good the stock.

Mr. Pemberton and *Mr. Blunt* appeared for the information.

Mr. Kindersley and *Mr. Metcalfe*, for the corporation, cited *Attorney General v. Gascoigne* (1).

Mr. George Turner appeared for the master of the school; and

Mr. Bellamy, for the trustees.

THE MASTER OF THE ROLLS.—The words of this bequest are sufficiently ambiguous; at the same time I do not think the construction can be very well doubted. "I give to the town of Wisbeach"—that certainly means the corporation—"my house or inn there standing in the Market Hill, known or called the Black Bull, with the oil-mills thereto belonging, barn, stables, shops, oil-house, and all thereto belonging; the one-half of the revenue to amend the schoolmaster's wages of the free school, and the other moiety to be laid out at the best time of the year to buy corn and firing to be given to the poor of the same town, about Christmas or New Year's day: this to be done by the ten men corporate of the town of Wisbeach, or six of the best men in that town." Therefore, it was not precisely in the mind of the testator here, who was to be employed in the doing of this work;—it might be ten men, corporators of Wis-

(1) 2 Myl. & K. 647; s. c. 1 Law J. Rep. (n.s.) Chanc. 122.

beach, or it might be six of the best men in that town. "I take the rent to be 40% a year and better: the overplus I give to ten men or others appointed for the doing thereof, and to repair the house as they see cause, desiring them they use the tenant well as I have done," and so on. What is contended by the corporation is, that this is a gift of the overplus to the corporation. It is difficult so to construe it; because he desires what is to be done by the ten corporators of Wisbeach, if possible. It might be the corporation meant by him, for it is in the alternative,—“or six of the best men in that town,” which may be persons varying from year to year, not persons taking a perpetual gift such as here supposed. “40% a year and better” certainly does seem to me to mean more than 40% a year. “40% a year,” and “the overplus I give to the ten men or others appointed for the doing thereof, and to repair the house as they see cause.” I do not think this does amount to more than this, that what overplus there may be beyond what is required for the school, which is given in these contradictory terms before, shall be employed in paying those persons, whoever they may be—the ten men or the others—who are appointed for doing this, and also for repairs. In other words, he seems to me to have meant to reserve out of that which was to be divided between the poor and the schoolmaster, a portion for the remuneration of the persons who are employed, and for the repairs. Certainly the words are very ambiguous, and it is not very easy to come to a conclusion upon them perfectly satisfactory. It appears to me that is the result of it. I cannot think the corporation were in the least to blame in coming to an opposite conclusion, and these words afford very natural reasons for them to do it. The corporation did what was irregular when they sold the property and converted it into stock; and afterwards, when they sold the stock and made it the means of purchasing the land-tax. Those things are irregularities. The Attorney General at this time is attempting to claim the stock, and claiming the stock, I think the corporation are entitled to the allowance mentioned by Mr. Kindersley. It is part of the value of that stock which was employed in purchasing the land-tax of this house; they bought the land-tax of the

house, and having sold the house, they take upon themselves the burthen attached to the house with respect to the river wall, so that the stock does not represent the clear value of the house, but more,—it represents the house, together with the land-tax charged upon the house, and the rent-charge for repairing the river wall. With respect to that, it seems to me, they are entitled to some deduction from that sum. How that is to be ascertained, I do not know: I suppose it could be ascertained without much difficulty. The stock was purchased from the money arising from the house; but the purchase-money which was obtained for the house was greater than it would have been if the corporation had not taken upon themselves the charge of repairing the river wall. If they had sold it subject to that charge, as they held it themselves, the purchase-money would have been less, and so with respect to the land-tax. It seems to me, therefore, that the stock, subject to those deductions, ought to be replaced. With respect to the costs of the suit, certainly, if it were a mere question of construction, I should have thought the corporation were entitled to costs, they being brought here, and the costs arising from the construction of the will of this testator, which is in terms extremely ambiguous and likely to mislead them, supposing the construction I have put upon it is correct. With respect to the others, they were brought here for the purpose of claiming from the corporation a specific sum. I think I shall not do wrong in this case if I make this decree against them without costs: the Attorney General to have his costs, and the schoolmaster.

K. BRUCE, V.C. } CALDICOTT v. CALDICOTT.
August 3.

Legacy—Tenant for Life of Residue.

Tenant for life of a residue entitled to interest at 4l. per cent. on the values of such items of the property of the testator as were not in a proper state of investment either at the death of the testator, or the end of the first year, taking in each case the less value,

This case is reported *supra*, p. 158. The cause now came on for further directions. The Master, by his report, found the values

of the items of property, which were not in a proper state of investment at the death of the testator, and he stated the value of them at the death of the testator, and also at the end of the first year.

KNIGHT BRUCE, V.C. ordered that 4l. per cent. on the values of some of the items at the death, and of others at the end of the first year, taking in each case the smaller of the two values, should be paid to the tenant for life, from the death of the testator. He repeated, that he should act in all future cases upon the rule laid down in *Gibson v. Bott* (1), and *Walker v. Shore* (2).

WIGRAM, V.C. }
May 26; } LILEY v. HEY.
June 4. }

Devise—Trust—Charity—Perpetuity—Uncertainty.

F. L. devised real estates to trustees, upon trust to distribute the rents among certain "families," according to their circumstances, as, in the opinion of the trustees, they may need assistance, whose names are hereinafter mentioned, (the will then named twenty-four persons):—Held, that this was a good trust, and not void, as a charitable use, nor on the ground of uncertainty or perpetuity.

F. Liley, by his will, dated 23rd of April 1837, after directing payment of his debts, gave all his real estates at K, to the vicar and churchwardens of the parish of K, and their successors, and to G. H. the elder, G. H. the younger, J. B, and T. B, their heirs and assigns, in trust to receive the rents, and apply the same as follows: to Hannah B, an annuity of 15l., for her life; also to the trustees of the D. Sunday School 2l. per annum; also to the new school 2l. per annum, and to apply the remainder, if any, in the manner following:—"Upon each 1st of December, or St. Thomas's day, in every year, to distribute among certain families, according to their circumstances, as in the opinion of the trustees they may need assistance, whose names are hereinafter mentioned." (Here followed the names of twenty-four persons.)

(1) 7 Ves. 89.
(2) 19 Ves. 387.

The plaintiff, as heir-at-law of the testator, filed his bill against the devisees in trust under the will, seeking to set aside these trusts as void for perpetuity, and as too indefinite in their objects for the Court to compel execution of them.

The only question was, as to the trusts of the remainder of the rents.

Mr. Rogers, for the plaintiff.—This is a trust for charitable purposes, and void within the Statutes of Mortmain; secondly, it transgresses the rules of perpetuity, and, being void in its creation, is incapable of modification.

Lord Southampton v. the Marquis of Hertford, 2 Ves. & B. 54.

Duke of Marlborough v. Godolphin, 2 Ves. sen. 61.

Thirdly, it is too indefinite for the Court to execute, and therefore void—*Ellis v. Selby* (1). The word "family," cannot be held to mean any definite persons.

Ommanney v. Butcher, Turn. & Russ. 260.

Coxe v. Basset, 3 Ves. 155.

Leake v. Robinson, 2 Mer. 363.

Mr. Elmsley, for some of the families named.—The word "family" is sufficiently definite.

Brown v. Higgs, 8 Ves. 574.

Wright v. Atkyns, 17 Ibid. 260.

Pierson v. Garnet, 2 Bro. C.C. 38.

This is not a charity—*Morice v. the Bishop of Durham* (2), but a trust for certain persons, with a power of selection in the trustees. The question of perpetuity does not arise at present.

Mr. Twells, for the trustees.

Mr. Rogers, in reply.

June 4.—WIGRAM, V.C.—In this case, the heir-at-law contends, that the devise is void on three grounds: first, because it is for a charitable purpose; secondly, on the ground of perpetuity; thirdly, because the objects are uncertain. In order to try the value of the first objection, I shall assume that the other two cannot be sustained. A devise to objects, however poor they may be, is not a devise for charitable purposes. Upon the second point, I was referred to *Wright v. Atkyns*, for the opinion of Lord

(1) 1 Myl. & Cr. 286; s. c. 5 Law J. Rep. (n.s.) Chanc. 214.

(2) 9 Ves. 399, 405.

Eldon, shewing the great difficulty, in such cases, of putting a construction on the word "family." But I am inclined to think, the testator himself has put the construction upon it, and that the persons named in the will are the objects described by the word—*Barnes v. Patch* (3), *Cruwys v. Colman* (4), *Pyot v. Pyot* (5), *Sugden on Powers*, 584, 538, 5th edit. I admit, that where an undefined interest is given, the Court cannot execute the trusts; but where the will directs that the objects are to take in succession, there can be no reason why the devise is to be held void, on the ground of perpetuity. Inquiries must be directed, with respect to the state of the families, whether the persons named were living or dead, and, if any of them were dead, whether they had left any and what children, reserving liberty to the heir-at-law to apply.

WIGRAM, V.C. }
June 6, 28. } BOURNE v. BOURNE.

Mortgage—Trust for Sale—Conversion.

A. conveys real estate by way of mortgage to S, his heirs and assigns, as trustee for the mortgagee, upon trust, after default in payment by A, at his and their discretion absolutely to sell, &c., and after payment of the mortgage debt, expenses, &c. upon trust as to the surplus for A, his heirs, executors, administrators, and assigns. After A's death the estate is sold:—Held, that the surplus proceeds of the sale were to be considered as realty.

W. Bourne, being seised in fee of property subject to a mortgage to Dunn, who was desirous of being paid off, requested Good to advance the money necessary for that purpose, and also to make him a further advance upon the property, which Good consented to do. Accordingly, by lease and release of the 13th and 14th of June 1822, between Bourne of the first part, Dunn of the second part, Good of the third part, Southall, a trustee for Good of the fourth part, and Barber, trustee of a term, of the fifth part, the property was conveyed to Southall in fee, discharged of the mortgage

to Dunn, upon trust, to allow Bourne to hold till default in payment of the mortgage money, &c.; and in case of default, that Southall, his heirs and assigns, should enter into the possession of the premises, and into the receipt of the rents and profits, and at his or their discretion absolutely sell the premises, or any part thereof, and stand possessed of the proceeds of such sale, after payment of the mortgage debt, expenses, &c. for Bourne, his heirs, executors, administrators and assigns. Bourne died, and by his will, gave all his interest in the mortgaged premises to the plaintiffs. The property was afterwards sold by Southall, and the personal representatives and the devisees both claiming the surplus proceeds of the property, the devisees filed their bill to establish their claim.

Mr. Girdlestone, for the trustees under the will, objected, that the personal representatives of the testator ought to have been made parties to the bill.

Mr. Sharpe and *Mr. B. Parry*, for the plaintiffs.—If the estate had been sold in the lifetime of the testator, the surplus proceeds would have been personalty; but as it was not sold till after his death, they retain their character of realty, and the personal representatives are not then necessary parties.

Wright v. Rose, 2 Sim. & Stu. 323.

Shadforth v. Temple, 10 Sim. 184.

Coote on Mortgages, p. 157.

Mr. Cameron, for the heir-at-law.

June 28.—WIGRAM, V.C.—I take the rule of the court to be this: if a person charges his property with the payment of his debts, or conveys it to a trustee for the payment of his debts, and there is no indication of an intention to convert it out and out, if the property should not be converted at the time of his death, it is real estate; if converted at the time of his death, it is personalty. But unless there is a clear indication of an intention to convert it out and out, it retains the character of realty till converted. If, on the other hand, the owner has said, that the trustee shall hold it, with absolute directions to convert it at all events, then it is personalty, though not sold at his death. The only cases I need refer to are—*Van v. Barnett* (1),

(1) 19 Ves. 102.

(3) 8 Ves. 604.

(4) 9 Ibid. 319.

(5) 1 Ves. sen. 335.

Biggs v. Andrews (2), and *Wright v. Rose*, where the proposition of law that I have stated is correctly laid down. The cases are all collected in *Dalzell on the Law of Conversion*, p. 89. The deed in this case is a mere mortgage charge, and quite inconsistent with the notion of an intention to convert absolutely; and it merely gives the trustee a discretion to sell after default, which discretion was not exercised till after the death of the mortgagor. The surplus proceeds therefore of the sale retain the character of real estate.

V.C.
July 20, 25, 27. } TREVOR v. TREVOR.

Devise—Settlement—Issue—Forfeiture.

A testator devised lands to trustees, upon trust, for G. R. for life; remainder to his issue in tail male in strict settlement, provided that all persons coming into possession of the estate should, within one year, take the name and arms of T, on the same condition, as far as circumstances would permit, as lands in S. were limited in another will, which was, that the estate should go over to the persons next entitled, upon the person in possession becoming entitled to the barony of D; and it was provided, in case of neglect, refusal, or discontinuance to use such name &c., the estate should go over as if the party so neglecting, &c. were dead, if tenant for life, or, if in tail, as if there was a failure of the issue in tail. G. R. had five daughters only. On exceptions to the Master's report, approving of a settlement excluding them,—Held, first, that the daughters of G. R. took collectively in tail male, with cross remainders as tenants in common, and were entitled to a limitation to that effect, after the limitation to the first and other sons. The words "tail male," describing the estate; "issue," the persons taking after the first taker; and "in strict settlement," the mode in which such first taker took; the forfeiture, on breach of the condition of taking the name, &c., pointing to a plurality of persons, the daughters of G. R. took as tenants in common. Secondly, that although the clause in the will of the estate in S. did not literally apply to a life estate, yet G. R. was bound by it, and

his life estate would clearly cease on the accession of the barony of D. to him, and that this should not affect the issue in tail, unless there were other issue capable of inheriting the estate; and that forfeitures by reason of refusal to take the name and arms of T. should not extend to collateral issue in tail.

John Viscount Hampden by his will, dated the 6th of September 1824, after giving two annuities, devised all his manors, messuages, advowsons, lands, tenements, and hereditaments in the county of Sussex, over which he had any power, unto the Honourable General Henry Brand, of Hill Street, Berkely Square, for life, or until he should succeed to the barony of Dacre, without impeachment of waste, except spoil or permissive waste in houses or buildings, with full power for the said Henry Brand, during such estate, to lease all or any of the same freehold and copyhold hereditaments for any term not exceeding twenty-one years in possession at rack-rents; but so as to prevent forfeiture of the said premises, proper licences for leasing to be obtained, if requisite, and so that such leases should be with proper conditions for securing payment of the rents thereby reserved; and after the decease of the said Henry Brand, or his succeeding to the said barony of Dacre, he devised the same unto Thomas Brand, son of the said Henry Brand, for his life, or until he should succeed to the said barony of Dacre, with such power of leasing, and without impeachment of waste, except as thereinbefore mentioned; and in case of the determination of the said estate in the lifetime of the said Thomas Brand by any other means than the said Thomas Brand's succession to the said barony, the said testator gave the same hereditaments unto John Brooks and Robert Trevor, Esqrs., their heirs and assigns, during the life of the said Thomas Brand, and until he should succeed to the said barony, upon trust to preserve contingent remainders; and after his decease, or succeeding to the said barony, he gave the aforesaid freehold and copyhold hereditaments to the first and other sons of the said Thomas Brand in tail male, and in default of such issue, unto the said Henry Brand, his heirs and assigns, for ever; provided, that whenever any son of the said Thomas Brand, or his

issue male, should succeed to the barony of Dacre, the estate of the person so succeeding (provided any other son, or his issue male, of the said Thomas Brand should be then in existence) should determine as if the said son or issue male were not only actually dead, but as if there were an utter failure of issue male of such son ; and thereupon the said hereditaments should go over to the next or other sons of the said Thomas Brand or his issue male ; provided also, and the said testator's will was, that every person who came into possession of the said estates should, within one year after becoming entitled to such possession, by licence from the crown or act of parliament, or other proper means, " take and use the surname of Trevor," and no other surname, and bear the arms of Trevor ; and in case any such person should neglect or refuse so to do, or discontinue to use solely such surname or to bear such arms, then the estate of the person by whom the same should take place should cease, if a tenant for life or in tail, as if he were actually dead, and there were an utter failure of his issue male, or of the ancestor through whom he acquired his estate, and the said estates should go over to the person entitled under the gifts aforesaid ; and the said testator appointed John Brooks, Robert Trevor, and Joseph Rogers executors of his said will.

On the day following the date of this will, the testator made a disposition of his personal estate, which was of very considerable amount, chiefly in favour of his wife, and gave a great number of specific and pecuniary legacies ; and on the next day, being the 8th of September 1824, he made a further will of his landed property, whereby he devised as follows :—
 "Unto Gen. the Hon. Henry Brand and Joseph Rogers, gent. and their heirs, all and every my real estates in the county of Bedford, whether freehold or copyhold, upon trust, that they or the survivor of them, or his heirs, do and shall settle and convey the same to the use of or in trust for the Hon. George Rice, son of Lord Dynevor, for life, without impeachment of waste, except permissive waste or spoliation, with remainder to his issue in tail male in strict settlement, upon condition that all person or persons, from time to time to come into possession of the said settled estates, do and shall within

one year afterwards take the name and bear the arms of Trevor ; and also upon the like condition to that I have made in my will of my Sussex estate, so far as the change of circumstances will permit, that the said estate shall go over to the party next entitled, on the persons for the time being possessed becoming entitled to the barony of Dynevor ; and in default of such issue of the said George Rice, I devise my said Bedfordshire estates unto the said Henry Brand, his heirs and assigns for ever." The testator then went on to direct, that in the said intended settlement should be contained the usual or reasonable powers of leasing for the said George Rice, and for the trustees to preserve contingent remainders, during the minority of the tenants in tail in possession, and also for the said George Rice to jointure any wife to the extent of one-fifth of the then annual rental of the settled estates, and to portion a younger child or children, so that the said estates should not be liable to a greater burthen than 10,000*l.* with interest at 4*l.* per cent. ; but so that such appointment among the children should be in every respect under the dominion of the said George Rice, and that such settlement contain the usual powers of sale, exchange, partition, and enfranchisement for the said George Rice and the executors during the minority of the tenants in tail in possession, and a power of appointing new trustees and every other necessary and usual power. The testator then concluded in these words,—"And it is my will and intention, that notwithstanding the absolute devises contained in my will of the Sussex estate in favour of the said Henry Brand and his son and issue male, that a settlement, under the direction of the said Henry Brand and Joseph Rogers, or the survivor of them, be made of such estate so as to include such powers, provisions, and clauses *mutatis mutandis* as are hereinbefore mentioned concerning my Bedfordshire estates." By a codicil, dated the day prior to the last recited will, the testator bequeathed all the residue of his personalty to his executors upon trust, as to one-third, to lay out the same in the purchase of lands to be settled to the same uses as he had declared concerning the Sussex estate, and as to one other third part thereof, to lay out such third also in the purchase of lands by way of addition

to the Bedfordshire estates, to be settled to the same uses as he declared concerning such estates. The remaining third part was left undisposed of, but by a fourth codicil made immediately before his death, he bequeathed the same to Robert Trevor, Esq., his executors, administrators, and assigns, for his own use. Lord Hampden died on the 9th of September 1824, and shortly after his decease Mr. Rice assumed the name of Trevor, and in February 1825 filed a bill against Gen. Henry Trevor, Joseph Rogers, Robert Trevor, and Mr. Boscawen, Lord Dynevor, and Lord Dacre, the three co-heirs-at-law of the testator. In 1826, Frances Emily Rice Trevor, a daughter of Mr. R. Trevor, was, by supplemental bill, made a co-plaintiff with her father, and the usual decree for an account taken before his Honour the Vice Chancellor of England; another suit (*Trevor v. Hampden*) had also been instituted, and an order was made in both suits in November 1827, directing certain inquiries as to matters not now in dispute.

The Master made his general report, which, in February 1828, was absolutely confirmed; and by an order made at the Rolls, on further directions, in July 1828, it was referred to the Master to approve of a proper settlement of the Bedfordshire estates, and of the real estates (if any) which had been purchased with the one-third of the residuary personal estate since the testator's death, according to the terms of the will; a like order was also made as to the Sussex estates, and a settlement of them executed without discussion. Mr. G. Rice Trevor had five daughters and no son, and, in consequence, in July 1839, for the purpose of getting the settlement of the Bedfordshire estates executed, Mr. G. Rice R. Trevor filed a supplemental bill against Gen. Trevor and his (Mr. G. Rice R. Trevor's) five infant daughters. On the 25th of May 1839, the Master made his report, in pursuance of a decree made in the cause, whereby he stated, that certain purchases had been made out of the residue of the personalty as an addition to the Bedfordshire estates, and that he had approved of a draft for a proper settlement of such estates. This draft was objected to by Gen. Trevor's counsel, who suggested several alterations, and, upon argument before the Master, every

point was decided in Gen. Trevor's favour. In the settlement, as approved by the Master, there was no limitation to the daughters of Mr. G. Rice R. Trevor. The clause respecting the barony of Dynevor was so worded, that in case it should descend upon Mr. G. Rice R. Trevor, the estates should pass as if he were actually dead; and if his son should become entitled to the said barony, or his issue male, then as if there were a total failure of such son's issue male; and that part of the settlement which applied to the adoption of the name and arms provided, that in case of the neglect, refusal, or discontinuing to use such name and arms as mentioned in the will, if the person who so neglected was a son of Mr. G. Rice R. Trevor, then the estates should go over as if there were a total failure of such son's issue male; or if Mr. G. R. R. Trevor himself should neglect, then as if he were actually dead: and in the last part of the settlement Mr. G. Rice R. Trevor's power of jointuring was extended to one-fifth part of the then ordinary annual rental of the estates. To this report, three sets of exceptions were taken: the first by Mr. G. Rice R. Trevor; the second by his eldest daughter, Francis Emily R. Trevor; and the third set by her four younger sisters. In the first set, which related to the limitation to the daughters of Mr. G. R. R. Trevor, all the exceptants joined. Mr. G. R. R. Trevor urged, that immediately after the limitation to the first and other sons of the said George R. R. Trevor in tail male, a limitation ought to be inserted "in favour of the daughter and daughters of the said plaintiff, G. R. R. Trevor," but insisted upon no particular form. F. E. R. Trevor proposed, that the form of the limitation should be to the first and other daughters of the body of the said G. R. R. Trevor, successively in tail male, in the usual manner: and the four younger daughters insisted, that the limitation should be in the same form as that proposed by their sister, but with benefit of survivorship.

The second and third exceptions relating to the power of charging portions and granting leases, depended upon the first; in the former, F. E. R. Trevor alone excepted, insisting upon the words "or eldest or only daughter for the time being entitled," &c. being inserted, G. R. R. Trevor, standing neuter, and the younger daughters approv-

ing of the form made use of by the Master. In the third exception, all the excepting parties joined in insisting that the power should be given after the decease of the plaintiff, G. R. R. Trevor, to the trustees "during the minority of any child or children of the said G. R. R. Trevor." The fourth exception was to the shifting of the estate on accession to the barony of Dynevor. In this F. E. R. Trevor and the other daughters supported the form approved by the Master, and G. R. R. Trevor alone excepted, insisting on the insertion either of a proviso, that in case the said barony should descend on any person or persons, thereby made tenant in tail male, or the issue male of such person, then the uses thereby limited to cease, as if such person were dead, and the hereditaments immediately go to the person next beneficially entitled, as if the person or his issue male, whose estate should so cease, were actually dead; or a proviso, that in the case before specified, the uses, provided that there should then be in existence any other child, or issue male of any other child, of the said G. R. R. Trevor, should cease, &c., as if such child, &c. were actually dead, and the hereditaments should go, &c., as if such child, &c., as in the other proviso, relative to bearing the surname and arms of Trevor. In the fourth exception, all the parties excepting joined, Mr. G. R. R. Trevor insisting upon the insertion of the words "of his, her, or their bodies," and the striking out of the words "or in case the said George R. R. Trevor shall at any time discontinue, &c." inserting the words, "shall go to the person next beneficially entitled." F. E. R. Trevor adopted the form approved by the Master relative to the mention of Mr. G. R. R. Trevor's name, but insisted on the words "he or she, and of his or her body, &c." being inserted, and the remainder in the form proposed by G. Rice R. Trevor; her sisters also concurred in the exception with her; but G. R. R. Trevor alone took the sixth exception, which related to his power to jointure, in which he urged the insertion of the words, "any clear annual sum, without any deduction whatsoever."

The points which were discussed in this case arose upon the above exceptions; and the questions made were, first, whether in

the proposed settlement of the Bedfordshire estate, there was or was not to be a limitation to Mr. G. R. R. Trevor's daughters in tail male, inserted after the limitation to the sons in tail, the words used in the will being, "to his issue in tail male in strict settlement." In the next place, whether the clause for shifting the estate on the accession of the barony of Dynevor was to apply to Mr. G. R. R. Trevor, or to some other person who might inherit the estate so limited to his issue in tail male: next, whether the non-compliance with the condition of the will relative to taking the name and arms of Trevor would operate against Mr. G. R. R. Trevor's issue; and lastly, whether Mr. G. Rice R. Trevor should have power to jointure to the extent of one-fifth of the then ordinary annual rental, or one-fifth of the clear annual rental of the settled estates, to be payable when the jointure was made.

The Solicitor General and *Mr. Romilly* appeared for Mr. G. R. R. Trevor.—The words of this limitation, *primâ facie*, comprehend daughters. The limitations here are by no means similar to those used in the will of the Sussex estates, for there the ultimate remainder was to Mr. Brand in fee simple, giving him power and enabling him fully to provide for his daughters. There is nothing here to cut down the word "issue," or limit its meaning. It is a clear proposition laid down, that when the word "issue" is used, it includes both sons and daughters, unless a contrary intention is decidedly expressed.

Hart v. Middlehurst, 3 Atk. 371.

Oddie v. Woodford, 3 Myl. & Cr. 584;
s. c. 7 Law J. Rep. (N.S.) Chanc. 117.

Fearne Cont. Rem., 6th edit. 105.

Lord Eldon distinctly said, in a case which came before him, that where the word "issue" was used so as to apply to both sexes, unless some expression was used to curtail its meaning, it did apply to both. The proviso concerning the name and arms of Trevor, cannot exclude daughters.

Mr. Bethell and *Mr. Wickens*, for Miss F. E. R. Trevor.—The onus lies on the other side, to prove that Miss Trevor and her sisters are not entitled to a limitation in the settlement. The Master's only foundation for a contrary opinion was the simi-

larity of the Sussex will to this, for no argument against us can be drawn from the peerage shifting clause. The Sussex will is drawn with sufficient accuracy, but with a different final limitation.

West v. Errissey, 1 Bro. P.C. 225 ; s. c. 2 P. Wms. 349.

West v. Spencer, Collect. Jur. 378.

Mr. Daniell, for the other daughters.

Mr. Stuart and Mr. Hodgson, for Henry Brand (now General Trevor).—By “issue” is meant the whole descending line. The case of *West v. Errissey* goes too far, for the limitation is there in tail female.

[The VICE CHANCELLOR.—If “issue” ever means sons, why should it not mean children ?]

The question is, are the words “in tail male” to be descriptive of the persons who are to take, or of the estate they are to take ?

Marshall v. Bousfield, 2 Mad. 166.

Blackburn v. Stables, 2 Ves. & Bea. 367.

The words “in strict settlement” must apply to Mr. G. R. R. Trevor. There is no direct authority on the point of the limitation to the daughters, for the cases cited are all upon marriage articles. The daughter of a son is as much within the words “issue male,” as the daughter of the first taker. The words “in strict settlement,” were meant only to operate as a check upon Mr. G. R. R. Trevor.

The Solicitor General, in reply.

July 25.—The VICE CHANCELLOR.—This matter seems to me to turn entirely on the words “in tail male.” The testator devised all his estates, in Bedfordshire, to persons named in his will, upon trust that they should convey and settle the same to the use of, or in trust for Mr. George Rice Trevor, for his life, without impeachment of waste, except permissive waste or spoliation in buildings, with remainder to his issue in tail male in strict settlement. The words “strict settlement” are to be referred to Mr. G. R. R. Trevor, and do not in any manner affect the subsequent limitation to the children; the settlement would be equally in strict settlement, whatever the form of the limitation to the children; it is used merely to modify the words “in tail male,” to shew that the first taker should not disappoint the limitations to the children. The method

was therefore adopted, of binding the first taker to a life estate, or for ninety-nine years if he should so long live; first, he took an estate of freehold by the limitation to the first taker for life, then to trustees during his life to preserve contingent remainders: the settlement thereby being such as that he should not have power himself of disappointing the limitation for the benefit of his children. The mode in which the parties are to take is quite apparent; they are to take in tail male. Then the only question is, who is to take? The answer is, the issue. The words, “in tail male,” “in fee simple,” or like words, do not describe the persons to take, but the estate which they are to take; and this is plain, if we consider the language used by Littleton: in the first section, he says, “Tenant in fee simple is he which hath lands or tenements, to hold to him and his heirs for ever;” in the 14th and 15th sections, where he mentions tenant in tail, by virtue of the 13 Edw. 1, he says, “It is in two forms, there may be a tenant in tail general or tenant in tail special,” and then describes a tenant in tail general thus: “Tenant in tail general is where lands and tenements be given to a man and to his heirs of his body; and a tenant in tail special is where lands and tenements be given to a man and his wife, and the heirs of their two bodies begotten.” The language of law is therefore quite clear in its meaning. The words describe the interest which the descendants of the issue are to take, inasmuch as they describe the interests which the issue themselves are to take, and the next taker will therefore take by descent, and not by purchase. It is, therefore, by virtue of the estate which the issue are to take, that their descendants take their estate. The words then in this manner describe the persons who are to take, but not the persons who, in the first instance, are to take that estate which descends to particular heirs. The testator evidently meant, that estates in tail male should be limited to those who were to take immediately after the tenant for life, for he uses the word “issue;” this is further confirmed, by the expression used in the will of the Sussex estate; where he has occasion to speak of the “issue male,” he uses those words, and if he had meant that the issue of those who were the first takers of the Bedfordshire estates should be

the issue male, having reference to the method used in the will of the Sussex estate, I cannot but think he would have said so; but he has most carefully avoided using the same language as that used in the will of the Sussex estate, and has used language in the second will, which I think sufficiently shews, that the parties to take after the tenant for life are the issue generally, the law giving the estate imperatively to the first takers, the children; and if they do take in tail male, my opinion is, that all of them take, and that in this way the direction contained in these words will be complied with. The exceptions turning on this point must be allowed; as to how the daughters shall take, is a matter for future consideration. I therefore will declare that the persons to take in remainder, after Mr. George R. R. Trevor, are his children.

July 26.—*Mr. Bethell* and *Mr. Wickens*, for Miss F. E. R. Trevor, contended, that the mode in which the daughters of Mr. G. R. R. Trevor were to take, was, successively in tail male, as they stood in seniority.

The VICE CHANCELLOR.—The words of the will are, "to his issue in tail male." These words do not point out whether the daughters are to take seriatim or collectively; but by the help of a proviso which appears in the will, I shall be able to decide the question. In this proviso are these words: "upon condition that all person or persons, from time to time to come into possession of the said settled estates, do and shall, within one year afterwards, take the name and bear the arms of Trevor." This *prima facie* points to the case of daughters coming in collectively, as well as a single one alone. This cannot be taken to apply to the case of a daughter who becomes entitled marrying, and her husband refusing to take the name and arms, for we find these words: "and also upon the like condition to that I have made in my will of the Sussex estate, (viz. that upon the neglect, &c. to bear the name and arms,) the estate of the person by whom the same shall take place shall cease," &c. Now, it could not be the estate of a daughter's husband, but of a daughter herself. I am therefore of opinion, as this excludes all argument of that kind, that the daughters take collectively, and the limitation must be

to the daughters collectively in tail male, with cross remainders in tail male.

The Solicitor General and *Mr. Romilly*, on the fourth exception, with regard to the shifting of the estate, on the accession of the barony of Dynevor.

The VICE CHANCELLOR.—I think that this point is settled by engrafting into the Bedfordshire will the same condition as is found in the Sussex will. Now, that is, "To Henry Brand, for his life, or until he should succeed to the barony of Dacre;" that is nothing more than to him for life, and if he should become entitled to the barony of Dacre, that his life estate should cease, and go over. The testator plainly meant, that no person entitled under the will of the Bedfordshire estates should take both those estates and the barony of Dynevor; that part of the fourth exception must therefore be overruled.

The Solicitor General and *Mr. Romilly* contended, that the operation of the shifting clause was restricted to there being no other person capable of taking, under the limitations to the issue in tail, upon the descent of the barony of Dynevor.

Mr. Stuart, *Mr. Loftus Wigram*, and *Mr. Hodgson*, contra.—The case put is that of an only son: suppose an only son, and a daughter: as, under the construction of the Court, the female as well as male issue take, nothing could prevent the Bedfordshire estates descending on the daughter.

The VICE CHANCELLOR.—Construing the will literally, the testator has provided, that the title of Dacre and the Sussex estate should go together, unless there is some party capable of inheriting the entail, upon the ceasing of the estate of the tenant in possession, under the clause in the will. This, therefore, does not aid the remainder in fee to Henry Brand, unless on failure of issue in tail male. The descendible nature of the Bedfordshire estate is quite different. The Sussex estate only sons could take; the Bedfordshire estate goes to daughters as well as sons; but sons only can inherit the barony of Dynevor. Then, supposing there was no daughter of Mr. Trevor, and no issue male of that daughter, on the descent of the barony on the only son of Mr. Trevor, or the only issue male of such son, then the party in possession would lose the estate, there being no person capable of inheriting under

the entail. I think the testator meant the same thing in both cases, viz. that a son of the tenant for life should be able to take the barony and the estate, unless there was some other person capable of inheriting it under the entail: that part of the exception is consequently correct.

Mr. Bethell, on the clause relating to the name and arms, argued against the Master's report.

Mr. Stuart, *Mr. Loftus Wigram*, and *Mr. Hodgson*, in support.

The VICE CHANCELLOR.—This condition must be put into the settlement, as it is done by reference to the Sussex will; but there is no reason that the estate of a brother of a person refusing to comply, should cease.

Exception allowed. With regard to the second exception, the following was agreed to: Declare that the plaintiff ought to be allowed to limit or appoint by way of jointure, at any time or times, one clear yearly sum or annual rent-charge, not exceeding in amount one-fifth part of the annual rental payable at the time of making such limitation or appointment in respect of the estate, then subject to the trusts of the settlement: subject to such declaration, allow the plaintiff's second exception.

WIGRAM, V.C.

March 18, 19, 23;
April 18.

LEEMING v. SHERRATT,
The Crown
52 L.J. 801

Legacy — *Construction* — *Dying without Issue* — *Vested Interest* — *Survivors* — *Substitutionary Clause*.

*The testator by his will gave 1,000*l.* to each of his three daughters; one moiety to be paid on their respectively attaining twenty-one, the other to be settled; the interest to their separate use for life, and the principal to be disposed of in such manner as they should direct among their issue; but in case they should die without issue, the principal to go among the survivors of the testator's children in equal proportions. The testator then gave the residue of his real and personal estate to trustees, in trust, to sell, &c., and to pay and divide the proceeds, as soon as his youngest child should attain twenty-one, unto and equally amongst all his children; one*

moiety of the shares of each of the daughters therein to be secured to her separate use for life, and the principal to be disposed of in such manner as she should direct amongst her children; but if no child, then the principal to be divided equally among the survivors of his children; and in case of the death of any of his children, leaving lawful issue, he gave to such issue the part or share the parent so dying would have been entitled to have:—Held, first, that the words in the particular gift, "in case they shall die without issue," did not import an indefinite failure of issue. Secondly, that one of the sons who attained twenty-one, and died, without leaving issue, before the period of distribution, had a vested interest in the residue transmissible to his personal representatives. Thirdly, that the word "survivors," in the gift over of the moiety of the daughters' shares, was to be construed in its natural sense, and not as "others." Fourthly, that the clause of substitution of the issue for the parent applied as well to the original share in the residue, as to the share of a daughter in the residue who died without issue; but was not to be extended to the share of the particular legacy.

The testator, Thomas Leeming, by his will, dated the 25th of February 1807, after directing his debts to be paid, and giving some pecuniary legacies, gave as follows: "I give to my son Thomas Leeming the whole of my property in the concern of Jenkins & Co. I give to my son John 700*l.* I give to each of my children, Sarah, James, Maria, Joseph, Frances, and Henry, the sum of 1,000*l.* each, to be paid respectively on their attaining the age of twenty-one, excepting such of them as are girls, in which case I order one-half part to be placed out at interest, to be secured from the controul of any husband with whom they or either of them may intermarry, the interest in the meantime to be paid to them, and the principal disposed of in such manner as they may direct to their issue; but in case they shall die without issue, I give the principal among the survivors of my children in equal proportions. I give, devise, and bequeath to my son Thomas Leeming, John Sherratt, and Thomas Belshaw, whom I hereby appoint executors of my will, and their heirs, executors, and administrators for ever, all my freehold property, and also

all the residue of my personal estate, in trust, to sell and dispose of my freehold property, and to collect and get in all my personal property, and to pay and divide the money arising therefrom, so soon as my youngest child shall attain the age of twenty-one, unto and equally amongst my children, share and share alike; but I direct one-half part of the shares of such of them as are daughters shall be placed out at interest, and be secured from the controul of any husband with whom they may intermarry, the interest in the meantime to be paid to such daughter, and the principal to be disposed of in such manner as she may direct amongst her children, if any; but if there be no child, then such share to be divided equally amongst the survivors of my children; and in case of the death of any of my children, leaving lawful issue, I direct and give to such issue the part or share the parent so dying would have been entitled to have."

The testator died in March 1807, and nine of his children survived him, and attained their full age, viz. Thomas, who died in February 1835, leaving issue; Elizabeth (afterwards Mrs. Grundy), who died in April 1824, leaving issue; John, who died in November 1811 intestate, and without issue; Sarah (afterwards Mrs. Mylne), who died in December 1836, without issue; James, a lunatic; Maria, (afterwards Mrs. Walton); Frances (afterwards Mrs. Tindall), who died in November 1824, leaving issue; Joseph, who died the 30th of May 1837; and Henry, the youngest, who attained his age of twenty-one years on the 30th of October 1822.

The bill was filed by the executors for the administration of the will; and the cause coming on for further directions, the questions were, first, as to the construction of the words "in case they shall die without issue," as applicable to the moiety of the 1,000*l.* legacy given to Sarah (Mrs. Mylne), and directed to be settled; secondly, as to the construction of the words "survivors of my children," both in the particular gift and in the residuary clause; thirdly, whether John, who attained twenty-one, and died before the period of distribution, took a vested interest in the residue; and fourthly, the operation and extent of the clause by which the issue of a deceased child were to take their parent's share.

Mr. Walker and *Mr. Bagshawe*, for the

plaintiff, the administrator *de bonis non* of the testator.—The question is, whether this is a good executory bequest. As a general rule, the Court in cases of personal estate does what it can to restrain the words "dying without issue," to prevent the limitation over becoming void. The moiety of the 1,000*l.* legacy given to Sarah Mylne, who died without children, is well bequeathed over to the children of the testator who survived Sarah Mylne.

Hughes v. Sayer, 1 P. Wms. 534.

Target v. Gaunt, Ibid. 432.

Ranelagh v. Ranelagh, 2 Myl. & K. 441; s. c. 1 Law J. Rep. (N.S.) Chanc. 183.

Massey v. Hudson, 2 Mer. 130.

This is, then, a good executory bequest. Next, as to the meaning of the word "survivors." Except the whole will taken together requires it, the word must be taken in its natural sense.

Davidson v. Dallas, 14 Ves. 576.

Crowder v. Stone, 3 Russ. 217.

The reasons given for construing it "others" do not exist in this will. As to the residuary clause, it must be construed survivors at the time of the distribution.

Thicknesse v. Liege, 3 Bro. P.C. 365.

Cripps v. Wolcott, 4 Mad. 11.

Pope v. Whitcombe, 3 Russ. 124; s. c. 6 Law J. Rep. Chanc. 53.

Ford v. Rawlings, 1 Sim. & Stu. 328; s. c. 1 Law J. Rep. Chanc. 170.

Hoghton v. Whitgreave, 1 Jac. & Walk. 150.

Howes v. Herring, M'Clel. & You. 295.

The residue must therefore be divided into as many shares as there were children surviving the period of distribution, and the estate of J. Leeming, the son, is not entitled to a share in the residue.

Mr. Temple, for the executors of Thomas Leeming, in the same interest as the plaintiffs, cited—

Skey v. Barnes, 3 Mer. 335.

Sanders v. Vautier, 1 Cr. & Ph. 240; s. c. 10 Law J. Rep. (N.S.) Chanc. 354.

Leake v. Robinson, 2 Mer. 363.

Mr. Elderton, for the defendant Grundy and the children of Elizabeth his wife, one of the daughters of the testator, who survived the period of distribution, contended, that John Leeming took no share in the residue; and that the word "survivors" was to be construed "others," it being the

testator's intention, where the gift to the parent failed, to give it to the issue, and that was evidenced by the substitutionary clause at the end of the will.

Davidson v. Dallas, 14 Ves. 576.

Crowder v. Stone, 3 Russ. 217.

Wilmot v. Wilmot, 8 Ves. 10.

Mr. Purvis, Mr. K. Parker, and Mr. Mylne, for other parties.

Mr. S. Sharpe, for *Mr. Mylne*, as administrator of his wife, contended, that she was entitled absolutely to the particular legacy; that the gift over was void for remoteness; unless it could be collected from the whole of the will, that the word "issue" was used in a more confined sense—*Barlow v. Satter* (1). That "survivors" must be construed "others;" if otherwise, the only effect would be to throw it into the residue. That as to the residuary clause, *Mr. Mylne* had no interest except to increase the share in the residue that his wife took absolutely; in that clause, the testator speaks of the failure of *children*, and there the limitation over was good; but that the estate of *John Leeming*, who did not survive the period of distribution, was not entitled to any share in the residue.

Mr. J. Bacon, for the personal representatives of *John Leeming*.—This is an absolute vested legacy in the residue. The substitutionary clause only applies to the case of a child dying and leaving lawful issue; and not to the case of a child dying, without leaving issue. The Court cannot decide that it was not a vested legacy in *John*, without deciding an intestacy as to his share; and this the Court always leans against—*Booth v. Booth* (2).

Mr. Walker, in reply.—Suppose all the children had died without leaving issue, for what reason is the Court to take away *Mrs. Mylne's* share for the purpose of giving it to the others? "Survivors" cannot be construed "others," because there is no indication in the will of an intention to extend it; and therefore the plaintiff and the three surviving children are entitled to the 500*l.* If it is held, that *John* did not take a vested interest

in the residue, there will be no intestacy as to his share, for the parties entitled to the residue will be the children who survived the period of distribution, and the issue of such as are dead; for the circumstance of deferring the enjoyment till a particular period is a strong indication of the testator's intention, that that was the period at which he meant that his bounty should be ascertained.

April 18.—*WIGRAM, V.C.*—Four points were raised in this cause. First, what interpretation is to be given to the words, "in case they die without issue;" secondly, whether the share in the residue of *John Leeming*, who died in 1811, (having attained his full age, but without leaving lawful issue,) before the youngest child of the testator had attained twenty-one, was transmissible to his representatives; or whether it was undisposed of by the will; thirdly, as to the construction of the word "survivors"; and fourthly, what parts of the testator's property are affected by that clause in his will, by which, in case of the death of any of his children leaving lawful issue, he directs and gives to such issue the part or share which the parent so dying would have been entitled to have.

Upon the first point, I think that it is manifest, from the will, that an indefinite failure of issue was not intended.

Ellicombe v. Gompertz, 3 Myl. & Cr. 127.

Target v. Gaunt, 1 P. Wms. 432.

Upon the second question, I am of opinion, that the share in the residue of *John Leeming*, who died without issue in 1811, before the youngest child attained twenty-one, and having himself attained the age of twenty-one, was transmissible to his representatives. The argument against this construction was, that the gift of the residue was future; that there was no gift of the residue, except in the direction to pay; and it was said to be the settled rule in the construction of wills relating to personal estate, that where a legacy is given, payable at a future time, and there is no gift except in the direction to pay, the legatee can claim nothing, except he is living at the time the legacy is payable. That the Court has in some way expressed itself in terms similar to this, I admit; but I think I should be misapplying the rule, if I were to hold that *John Leem-*

(1) 17 Ves. 479.

(2) 4 Ibid. 399.

ing's share was not transmissible to his representatives only because he died before the youngest child attained twenty-one. The rule of construction I take to be this: Courts of equity, in construing wills, as to personal estate, follow the rules of the civil law. By that law, when a legacy is given absolutely, and payment only is postponed, the Court considers the time annexed to the payment, and not to the gift of the legacy, and treats the legacy as *debitum in presenti solvendum in futuro*. That is the established rule; but a question sometimes arises, whether a mere direction to pay at a future day, without any independent gift, will make the legacy transmissible to the representatives of the legatee, should he die before the time of payment; and the Court in that simple case has sometimes considered the time of payment annexed to the legacy. But the Court, in so doing, never intended to decide that the gift of a legacy, under the form of a direction to pay at a future time, or upon a given event, was less favourable to vesting, than the simple case of a direct bequest at a future time, and in a like event; but, in fact, only intended to assimilate the cases to each other, and to distinguish the case of both from that class of cases, in which there is a gift of a legacy, and a direction to pay at a future period, distinct from the gift; and I am confirmed in the opinion which I formed at the hearing, that the question is one of substance, and not one of form. The question in all cases is, whether it is a condition precedent, that the legatee should survive the time appointed for the payment, and the answer is to be sought out of the *whole* will, and not in particular expressions, like those relied on here. In *Monkhouse v. Holme* (3), Lord Loughborough has stated the rule generally, "If the day is certain, it is vested; but where uncertain, the true question will be, whether it is in the nature of a condition, for if it is conditional, then in the very nature of the thing the time is annexed to the substance of the gift, as in the case of marriage, of puberty, or of any other situation of life, when the arrival of the time is a condition, without which the testator would not have made the gift." In *May v. Wood* (4),

(3) 1 Bro. C.C. 298.

(4) 3 *Ibid.* 472.

a case unimpeached in principle, the Master of the Rolls says, "All the cases establish this principle, that where the time is mentioned as referring to the legacy itself, unless it appears to have been fixed by the testator as absolutely necessary to have arrived before any part of his bounty can attach to the legatee, the legacy attaches immediately, and the time of payment is merely postponed, not being annexed to the substance of the gift; but, if it appears that the testator intended it as a condition precedent upon which the legacy must take place, then, if such condition or contingency does not happen, the gift never arises."

In *Barnes v. Allen* (5), the testator gave the residue of his personal estate to his wife for life, and after her decease to their children;—"but if it shall happen that my wife shall depart this life leaving no child or children at the time of her death, then my will is, that my trustees shall transfer the securities in which my estate shall be then vested to my two brothers, J. A. and H. A.; and in case either of them shall be then dead, then to the survivor." Both brothers died in the lifetime of the wife, and it was held a vested interest in both. So, I conceive, if a leasehold house is bequeathed to trustees for A, with a proviso, that if B. return from Rome within ten years, the trustees then to assign the premises to C; this would be an interest in C. transmissible to his representatives, though the legatee should die within the ten years, provided B. returned from Rome within that period—*Fearne's Cont. Rem.* 555. In *Sanders v. Vautier*, a testator gave to his executors and trustees all his East India stock, upon trust, to accumulate the dividends till D. W. V. should attain twenty-five, and then to transfer the principal, together with such accumulations, to D. W. V., his executors, administrators, and assigns absolutely: it was held, that D. W. V. took an immediate vested interest in the legacy. In that case, it was argued, that because there was no gift except in the direction to transfer, the party would not be entitled unless he attained twenty-five. It was true, that there were special circumstances in that case, but Lord Cottenham expressed a clear opinion independently of those special circumstances. The reasoning

(5) 1 Bro. C.C. 181.

of Sir W. Grant in *Hanson v. Graham* (6), in that part of his judgment in which he comments upon *Boraston's case* (7), supports what I will call the principle of these cases. In all the cases which may be supposed to support the plaintiff's argument against the interest of John being transmissible, the Court has laboured to shew that the future interest was by the terms of the will contingent, as, a legacy to a person "at the age of twenty-one," or "when" or "if" the legatee should attain that age, or in some event which might not happen; and that reasoning would have been superfluous if the circumstance of the gift being future and under the form of a direction to pay had furnished a simple rule for decision. *Thicknesse v. Liege* falls under the same observation. Of that case, Mr. Roper, vol. 1, p. 508, correctly remarks,—“The ground for the final decision seems to have been the clear intention of the testator, that all the limitations of the beneficial interest in his residuary property should be contingent, and that no person should take a vested interest in it before the right of enjoyment accrued.” The question, therefore, which I have to consider in this case is, whether, excluding the principle of the cases where there has been a gift distinct from the direction to pay, the testator has made the shares in the residue of such of his children as should die without leaving lawful issue contingent on their surviving the time when the youngest child shall attain twenty-one. The circumstance that the gift of the residue is future, and that there is no gift of the residue except in the direction to pay, are circumstances that I may be bound to advert to; but they are not conclusive. In this case, the persons to whom the residue is given are all the children of the testator, as tenants in common. The after-clause, which substitutes the issue of deceased children for the parents dying and leaving lawful issue, shews that the persons to whom, in the first instance, the residue is given, meant all the children who should survive the testator, and not those only who should be living when the youngest should attain twenty-one. The residue is given to the trustees, who are trustees for all the children of the testator

who should survive him, except so far as he should otherwise direct. Of *what* are they trustees? The income of the property to accrue between the death of the testator and the time of division would accumulate for the benefit of those to whom in terms the residue is eventually given. They are, therefore, trustees of the residue and of the interim profits for all the children of the testator (except so far as he has substituted others for them) upon the happening of an event which has happened, i.e. the youngest child attaining twenty-one. Again, he directs, that in case of his children dying, and leaving lawful issue, the issue are to take “the share the parent so dying would be entitled to have.” Upon these words it was argued, that the testator himself supposed that the parent so dying before the time of the division lost the share of the residue. But I do not think the words so full of meaning. The clause is nothing more than the common clause of substitution of one legatee for another, upon a given event; and the substitution is not general, but confined to the case of children dying, leaving lawful issue; and it does not extend to the case of children dying before the time of payment, not leaving lawful issue.

If the clause of substitution had not been so confined by the will, and one or more of the children had died, leaving lawful issue, before the time of payment, the argument in favour of the legacy being transmissible to the representatives of J. Leeming, would have been almost irresistible. I do not understand why such a clause of substitution should alter the substance of the will in a case where such a clause does not apply. The circumstances which, in the cases of residuary gifts, the Court has relied upon for preventing an intestacy, and which are noticed in *Booth v. Booth* (8), in *Love v. L'Estrange* (9), which was approved of by Sir W. Grant in *Hanson v. Graham*, and by Lord Cottenham in *Sanders v. Vautier*, are certainly not stronger than those which occur in this case. There is nothing improbable in the supposition that the testator intended his children to take an absolute interest, except in the event of their dying, leaving issue, before the period of

(6) 6 Ves. 247.

(7) 8 Rep. 16.

(8) 4 Ves. 399.

(9) 5 Bro. P.C. 59.

division. If any case could be found which decides in the abstract, that a gift of the residue to a testator's children, on an event which afterwards happens, does not confer a transmissible interest merely because the legatees die before the event takes place, I am satisfied that that case would be at variance with the other authorities. I notice the fact that John Leeming had attained twenty-one, for this reason—the testator having postponed the division till the youngest attained twenty-one, I think no child was intended to take a share, except he attained twenty-one. That is consistent with the proposition that all should participate in the residue who attained that age. I think this case is more analogous in principle to *Barnes v. Allen* and *Sanders v. Vautier*, than to *Thicknesse v. Liege*; for in that case the Court discovered a manifest intention that the residue should be contingent on the legatee surviving the period of division. Thirdly, I think that the word “survivors” must be construed in its natural sense, and not in the sense of “others.” In *Davidson v. Dallas*, the language of Lord Eldon shews that he considered that it must be taken in its natural sense, unless the whole will shews that it is used in a different sense. So also in *Crowder v. Stone*. In *Barlow v. Salter* (10), the dictum of the Court treats the word “survivors” as having a technical meaning, viz. the meaning of “others,” impressed upon it in practice. According to *Davidson v. Dallas*, one reason for construing the word “survivors” “others,” was said to be to take in all persons born before the period of distribution; in other cases, the object has been to prevent a family losing the provision intended for it by the death of a parent leaving children. The reason of the former case does not occur here, because the testator's own children are the legatees; and according to the construction which I put upon the clause, which substitutes the issue for their parents, I think the testator has guarded against the second inconvenience, so far, at least, as the residue is concerned. The word “survivors” must, therefore, be construed in its natural sense, and this construction of the word in one part of the will must determine its construction in the other part of the

will. *Cripps v. Wolcott*, *Hoghton v. Whitgreave*, and the other cases cited, raise a distinct question from the present case. Fourthly, I think there is nothing in the words of the will to prevent my applying the clause of substitution to an original share in the residue, and to a share in the residue of the daughter who died without issue,—and the intention of the testator will be best satisfied by my so applying that clause; but I cannot extend the substitutionary clause to the particular legacies.

WIGRAM, V.C. }
 June 22, 23. } HAWKINS v. HAWKINS.

Parties—Unascertained Class—Preliminary Inquiries.

In a suit to administer a will under which two classes of persons claimed to be interested, the plaintiff (the father of one class, and the grandfather of the other,) stated, and several of the defendants admitted, that all the members of the two classes were before the Court:—Held, that the Court would not declare the right without a previous inquiry before the Master, whether all the members of each class were before the Court.

The same rule holds, where the members of a class seek distribution among themselves; the Court must be satisfied by evidence that all the members of the class are before the Court.

The correctness of the case of Caldecott v. Caldecott impugned.

This was a suit by J. Hawkins, as executor and trustee, under the will of J. King, the testator in the cause, to obtain the declaration of the Court upon the trusts of the will, as to the residue. The two classes beneficially interested were, the children of the plaintiff, and the children of one of the defendants. The bill stated, and the answers admitted, that the individuals composing the two classes were all before the Court.

Mr. Roll, for the plaintiff, contended, that upon such statements and admissions, the Court would declare the right, without sending it to the Master to inquire as to that fact. That in *Arthur v. Hughes* (1) (not reported),

(10) 17 Ves. 479.

(1) Rolls, 23rd December, 1841.

where the father was plaintiff, and stated that all parties were before the Court, and every person interested was a member of his own family, Lord Langdale dispensed with the preliminary inquiries. That in *Caldecott v. Caldecott* (2), where the question was between the next-of-kin, as a class, and another party, it was held enough that some of the next-of-kin were present.

WIGRAM, V.C.—Lord Cottenham always said, that he would never allow the right to be decided first, and the inquiries to be made afterwards. I am quite satisfied, that his Lordship did not decide that abstract point in *Caldecott v. Caldecott*.

JUNE 23.—WIGRAM, V.C.—The plaintiff in this cause is a stakeholder, and the father of one class, and the grandfather of the other; and he says, that he has brought before the Court all the persons beneficially interested in the fund. This may be true, but the question is, what is the practice of the Court? Where the object of the suit is distribution, it is the practice of the Court to refer it to the Master, to inquire who the parties are. But, supposing it not to be necessarily a case of distribution, some evidence is necessary that all the parties are present, for the purpose of contesting the question. Here there is no evidence but the statement of the plaintiff, and the admission of some of the defendants. I should have had no doubt upon the subject, if it had not been for the statement of the practice before the Master of the Rolls; but he entirely disavows any practice of the kind, and says, that he sees no difference between the case of a distribution of a fund adverse to a class, and the case of a class coming to divide the fund among the members of that class; for, in the latter case, they may be equally interested in misrepre-

senting the number of the children. The Court, looking at the possibility of fraud, will not receive the admission of some of the children, because there may be a corrupt agreement between the father and some of the children to divide the property among themselves, to the exclusion of the others. Lord Langdale also said, that he remembered having decided that case upon the authority of *Caldecott v. Caldecott*, which he thought at the time was not in accordance with the practice. It appears by the registrar's book, that *Caldecott v. Caldecott* came on to be heard on the 18th of December 1840, when the cause stood over, that the plaintiff might amend his bill, and bring all proper parties before the Court. On the 5th of February 1841, the cause came on again, when Mr. James Parker, for the plaintiff, stated, that all the parties who claimed as next-of-kin were before the Court; and it is most probable that Lord Cottenham's attention was not called to the fact, that there was no evidence establishing that. What Lord Cottenham is made to say in the report of that case, is at variance with his Lordship's dictum in the subsequent case of *Shuttleworth v. Howarth* (3), "that the Court would never declare a particular class of persons entitled to a portion of a fund, before it had ascertained whether there were any other individuals answering to that class in existence." Looking, then, at the registrar's note of that case, and knowing Lord Cottenham's constant practice, I am quite satisfied that *Caldecott v. Caldecott* does not accurately represent what his Lordship said on that occasion; but that he must have supposed the fact in evidence, that the whole class was before the Court. There must be here the usual inquiry, as to the individuals composing the two classes interested under the will.

(2) 1 Cr. & Ph. 183; 10 Law J. Rep. (N.S.) Chanc. 180.

(3) 1 Cr. & Ph. 228; s.c. 10 Law J. Rep. (N.S.) Chanc. 2.

ORDER OF COURT.

11th of April 1842.

THE Right Honourable JOHN SINGLETON LORD LYNTHURST, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY LORD LANGDALE, Master of the Rolls; the Right Honourable Sir LANCELOT SHADWELL, Vice Chancellor of England; the Right Honourable the Vice Chancellor Sir JAMES LEWIS KNIGHT BRUCE, and the Right Honourable the Vice Chancellor Sir JAMES WIGRAM, DOTH HERREBY, in pursuance of an Act of Parliament passed in the fourth year of the reign of Her present Majesty, intituled, "An Act for facilitating the Administration of Justice in the Court of Chancery," and of an Act passed in the fourth and fifth years of the reign of Her present Majesty, intituled, "An Act to amend an Act of the fourth year of the reign of Her present Majesty, intituled, 'An Act for facilitating the Administration of Justice in the Court of Chancery,'" order and direct in manner following; that is to say,

I. THAT in cases where the defendant shall not have put in his answer in due time after appearance, and the plaintiff shall be unable, with due diligence, to procure a writ of attachment to be executed against such defendant, by reason of his being out of the jurisdiction of the Court, or being concealed, or for any other cause, then such defendant shall, for the purposes of this Order, be deemed to have absconded to avoid the process of this Court.

That in cases where any defendant, who may be so deemed to have absconded, shall have appeared by his own clerk in court, or an appearance having been entered for him under the eighth of the Orders of the 26th day of August 1841, he shall have afterwards appeared by his own clerk in court, the plaintiff may serve upon such clerk in court a notice, that on a day in such notice named (being not less than fourteen days after the service of such notice), the Court will be moved that the bill may be taken *pro confesso* against such defendant; and the plaintiff is, upon the hearing of such motion, to satisfy the Court that such defendant ought, under the provisions of this Order, to be deemed to have absconded; and the Court being so satisfied, and the answer not being filed, may, if it shall so think fit, order the bill to be taken *pro confesso* against such defendant, either immediately, or at such time, or upon such further notice, as under the circumstances of the case the Court may think proper.

That in cases where any defendant, who may be so deemed to have absconded, shall have had an appearance entered for him under the eighth of the Orders of the 26th day of August 1841, and he shall not afterwards have appeared by his own clerk in Court, the plaintiff may cause to be inserted in the *London Gazette* a notice, that on a day in such notice named (being not less than four weeks after the first insertion of such notice in the *London Gazette*), the

Court will be moved that the bill may be taken *pro confesso* against such defendant; and the plaintiff is, upon the hearing of such motion, to satisfy the Court that such defendant ought, under the provisions of this Order, to be deemed to have absconded, and that such notice of motion has been inserted in the *London Gazette*, at least once in every week, from the time of the first insertion thereof up to the time for which the said notice shall have been given; and the Court, being so satisfied, and the answer not having been filed, may, if it shall so think fit, order the bill to be taken *pro confesso* against such defendant, either immediately, or at such time, or upon such further notice, as under the circumstances of the case the Court may think proper.

II. That upon default by an infant defendant, in not appearing to, or not answering the bill, the Court may, upon motion, order that the Senior Six Clerk, not towards the cause, may be assigned guardian of such infant defendant, by whom he may appear to and answer, or may answer the bill, and defend the suit, upon the Court being satisfied that such defendant is an infant, and (if the infant has not appeared) that the *subpoena* to appear to, and answer the bill, was duly served, and (whether the infant has appeared or not), that a notice of such motion was (after the expiration of the time for appearing to or answering the bill, and at least six clear days before the hearing of such motion), served upon, or left at the dwelling-house of the person with whom, or under whose care, such infant defendant was at the time of serving the *subpoena*; and was also served upon or left at the dwelling-house of the father or guardian (if any) of such infant, where the person with whom, or under whose care, the infant was at the time of such service, shall not be the father or guardian of the infant; unless

the Court, at the time of hearing such motion, shall think fit to dispense with such last-mentioned service.

III. That the plaintiff shall, without special leave of the Court, be at liberty to serve any notice of motion, or other notice, or any petition, personally, or at the dwelling-house or office of any defendant, who, having been duly served with *subpoena* to appear to and answer the bill, shall not have caused an appearance to be entered by his own clerk in court, at the time for that purpose limited by the General Orders of the Court.

IV. That the 1st, 2nd, 3rd, 4th, and 5th, Orders of the 26th day of August 1841, shall not take effect until further order.

V. That the 22nd of the Orders of the 26th day of August 1841 shall be suspended until further order.

VI. That the Orders of the 26th day of August 1841 shall be amended as to numbers X, XI, XII, and XLVII, in manner following; (that is to say),

X. That no writ of execution shall hereafter be issued, for the purpose of requiring or compelling obedience to any order or decree of the High Court of Chancery; but that the party, required by any such order or decree to do any act, shall, upon being duly served with such order or decree, be held bound to do such act in obedience to the order or decree.

XI. That if any party who is, by an order or decree, ordered to pay money, or to do any other act in a limited time, shall, after due service of such order or decree, refuse or neglect to obey the same, according to the exigency thereof, the party prosecuting such order or decree shall, at the expiration of the time limited for the performance thereof, be entitled to a writ or writs of attachment against the disobedient party; and in case such party shall be taken or detained in custody under any such writ of attachment, without obeying the same order or decree, then the party prosecuting the same order or decree shall, upon the sheriff's return that the party has been so taken or detained, be entitled to a

commission of sequestration against the estate and effects of the disobedient party; and in case the sheriff shall make the return *non est inventus* to such writ or writs of attachment, the party prosecuting the same order or decree shall be entitled, at his option, either to a commission of sequestration in the first instance, or otherwise to an order for the Serjeant-at-Arms, and to such other process as he hath hitherto been entitled to, upon a return of *non est inventus* made by the commissioners, named in a commission of rebellion, issued for the non-performance of an order or decree.

XII. That every order or decree, requiring any party to do an act thereby ordered, shall state the time, or the time after service of the order or decree, within which the act is to be done; and that upon the copy of the order or decree which shall be served upon the party required to obey the same, there shall be indorsed a memorandum in the words or to the effect following: viz.

"If you, the within named A. B, neglect to obey this order (or decree), by the time therein limited, you will be liable to be arrested under a writ of attachment, issued out of the High Court of Chancery, or by the Serjeant-at-Arms attending the same Court; and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order (or decree)."

XLVII. That a creditor, who has come in and established his debt before the Master, under a decree or order in a suit, shall be entitled to the costs of so establishing his debt, and the sum to be allowed for such costs shall be fixed by the Master without taxation, at the time the Master allows the debt of such creditor, unless the Master shall think that such costs ought to be taxed in the regular mode, in which case the same shall be so taxed by the Master, and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established.

LYNDHURST, C.

LANGDALE, M.R.

LANCELOT SHADWELL, V.C.

J. L. KNIGHT BRUCE, V.C.

JAMES WIGRAM, V.C.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Court of Bankruptcy.

BY
CHARLES STURGEON, Esq.
AND
EWEN HENRY CAMERON, Esq. BARRISTERS-AT-LAW.

FROM MICHAELMAS TERM, 1841, TO TRINITY TERM, 1842,
BOTH INCLUSIVE.

CASES ARGUED AND DETERMINED

IN THE

Court of Bankruptcy.

COMMENCING WITH

MICHAELMAS TERM, 5 VICTORIÆ.

1841. } *Ex parte TURQUAND re VAN-*
Nov. 9. } *DERPLANK.*

Proof—Partnership—Dividend.

Case where, under the circumstances, the Court held that there was no legal partnership between the bankrupt and a creditor, and refused to expunge his proof.

Practice as to staying the order of dividend until an action has been tried.

This was the petition of the assignees of the bankrupts, and it prayed that a proof for 2,000*l.*, made by a person named Evil, a cloth-manufacturer, might be expunged, on the ground that Evil had, in fact, become a partner with the bankrupts, who were retail tailors and drapers, previous to their bankruptcy. The facts relied upon were, that on the 1st of March 1839 a memorandum was drawn up between Messrs. Vanderplank and Mr. Evil, whereby it was agreed that Mr. Evil should advance 2,000*l.* to the former, by 1,000*l.* in cash, and 1,000*l.* in goods at prime cost, with a view to a partnership, reserving to himself a power of declaring off, should the business not prove successful at the end of twelve months.

The firm had been V. & S. Vanderplank down to March 1839, after which it was Vanderplank & Co. Such alteration in the name of the firm appeared by the banker's book. Mr. Evil performed his part of the agreement. He advanced the 1,000*l.*, and

sent in the goods, and he did not declare off from the partnership at the end of the year. But when, subsequently, he found that insolvency was likely to ensue, he then denied a partnership, and declared that the advance of the cash and goods was a loan, for which he was justly a creditor. Against this the other creditors were opposed, and resisted the proof of such debt before the commissioner, but without success, the proof being accepted. The objections were, that Mr. Evil ought not to be allowed the option of sharing in the profits of the business, if it proved a lucrative concern, and not be held responsible for losses if it proved otherwise. The grounds of partnership were maintained to be, first, a written agreement for the partnership, which, although never signed by the parties, was in the handwriting of Mr. Evil; secondly, a verbal understanding of such agreement; thirdly, the performance of the agreement by Mr. Evil in every important particular. Previous to his advancing the money the account of stock was taken. Simultaneously therewith appeared the alteration in the name of the firm. He never inquired what was the meaning of the alteration, although so much interested as a creditor in knowing. He induced Messrs. Fletcher, the clothiers, of Gloucestershire, to draw bills on the firm of Vanderplank & Co. for his, Evil's, accommodation, telling Fletcher that the word "Co." in the firm, was represented by him,

Evil; and afterwards, at the request of Fletcher, he indorsed these bills in the hands of the Gloucestershire Banking Company.

Mr. Russell and *Mr. Elmsley*, for the petitioners, the assignees.—This debt ought to be expunged, on the ground that there was a partnership. Evil advances 1,000*l.* money and 1,000*l.* in cloth, and agrees to sell cloth at prime cost, and to alter the name of the firm to Vanderplank & Co.; and as the advance was a heavy one, he, Evil, was to draw bills for the amount, always taking them up in time, in order to meet the exigencies of the retail establishment. There was also a memorandum to the following effect: that at the expiration of a year Evil had the option of becoming an active partner; and as far as that gentleman's examination before the commissioner goes, and the affidavits of various persons concerned, can establish a fact, there is an agreement, and in that agreement acts done so as to give Mr. Evil the option of publicly declaring himself a partner up to the time of the bankruptcy; but Mr. Evil says, I contemplated only the written agreement as a mere memorandum; it was not signed; I was to advance 2,000*l.* to the concern, and all of us were to be allowed 5*l.* per cent. upon our capital. I was to delay becoming a partner to a future time, but I cannot say when that future time was to be; but if I determined not to be a partner, then the capital I had advanced was to be repaid me as a debt, and a certain sum paid me, as might be agreed upon, for the profits. There is nothing more certain than that Mr. Evil wished to have all the advantages of a partnership without the risk. Even upon his own shewing, it would be difficult to say who the third party was in E. and V. Vanderplank & Co. This document, although it is not signed at the foot, is a memorandum signed under the Statute of Frauds, as the name is written in the beginning of the document—*Proper v. Parker* (1). This agreement, and the acts done under it, prove the partnership. The witness Fletcher proves distinctly, that when asked who was meant by "Co.," Mr. Evil replied it meant himself, but that it had not yet been made public.

Mr. Anderton and *Mr. Bacon*, for the respondent.—The understanding between

the parties did not amount to a partnership. The word "Co.," so much relied upon by the petitioner's counsel, was nothing more than the usual nonentity made use of by leading merchants, to induce the world to suppose they had resources behind their backs. The taking of stock had reference to a contemplated partnership, which depended on future contingencies, and was never begun. The money was to be considered a loan, if no partnership resulted, and be deemed capital if the contrary. The difference between 2,000*l.* and 3,900*l.* in the proof of debt arose from goods sold and delivered in the usual way. An action at law was now depending, which involved the question of partnership.

[*SIR J. CROSS*.—Had not this case better be adjourned until a jury of merchants have given their verdict on the question of partnership. It is competent to me to order an issue on that point, but it would be a great difficulty were contrary verdicts to be given.]

Mr. Russell stated, that the petitioners were ready to postpone the further hearing of the case, on an order that the dividend on respondent's proof be retained, to abide the Court's ultimate decision.

Mr. Anderton objected to wait for the result of the action at law, which might never be brought to trial.

November 11.—*Mr. Anderton*.—The question before the Court this day is, whether there is a partnership or not. It is admitted that Mr. Evil agreed to advance money and goods in contemplation of a possible partnership, the acceptance of which was to be at his option at a future day. Before that day arrived, he refused the partnership, and called for the payment of his account. He brought an action for the sum due to him, which action was not defended, simply because there was no partnership or other defence; and therefore the bankrupts, to avoid expense, go before a Judge, and, by *nil dicit*, confess a judgment, which judgment was afterwards set aside, for want of form, under the statute. Mr. Fletcher's evidence is not worthy of credit: first, because he is a sworn foe of the respondent; secondly, because when Evil was called upon by the Gloucestershire Banking Company, at the instance of Fletcher,

(1) 1 Russ. & Myl. 625.

to indorse the bills, there could have been no necessity for such indorsement, if he then were, as Fletcher would now have it believed, a partner; because, if he were then a partner, he was a party *bound* by their acceptance; and the conduct of Mr. Evil was that of a trader, and not a partner. The usual course of the trade in furnishing cloth is not to send an invoice until the goods have been measured. After the measurement, the price is added. In the invoice of the goods sent in by Mr. Evil, the price is omitted. The accounts shew, that interest at 5l. per cent. is charged; and the money and goods are entered in the books as a debt from the firm to Evil. So soon as Mr. Evil made up his mind to decline the partnership, the parties met, and agreed that 15l. per cent. should be allowed for the goods.

[*Mr. Russell.*—This was not till after the bankruptcy.]

In these acts, there is no holding out of any partnership to the world. On several occasions, when it was of moment to Mr. Fletcher to shew that Evil was a partner, he never says he is one. Even on occasion of an angry discussion, when violent language was used by Fletcher to Evil, he never even then alluded to the partnership.

Mr. Russell, in reply.—The Court must certainly disbelieve Mr. Fletcher, or pronounce for an existing partnership. On his faith in Mr. Evil, Mr. Fletcher entered into large liabilities, which have been proved before the commissioners. Look at the agreement and the conduct of the parties. Here is 1,000l. advanced by Evil: when to be repaid?—1,000l. of goods advanced by Evil: when to be repaid? The very fact of the interest charged shews it was not a debt, because such interest as is charged cannot be made on such sums for such terms. But take it from the 1st of April, and it tallies exactly with the agreement. Without making any application for payment, Evil sues out, on the 23rd of July, a writ, and immediately thereon the bankrupts consent to a judgment, which was afterwards set aside. Such judgment was given by collusion, to favour their partner. In the month of July, when ruin to the bankrupts was inevitable, they agreed to consider the secret partner a creditor. It was perfectly competent for the bankrupts to have said, "You

shall not bring this action;" but they took the other course to save Evil, whose ruin would not benefit them, whilst his escape might have the effect of benefiting them on some future occasion.

Cur. adv. vult.

November 15.—SIR J. CROSS.—This is the petition of the assignees under the fiat to the estate of Messrs. Vanderplank, the cloth-factors, of Saville Row, praying to have expunged from the proof of debts a claim for 3,900l., made by Mr. Evil, and admitted by the commissioners. It is not denied that the sum of 3,900l., in money and goods, had been advanced to the bankrupts, but that it had been made jointly with the bankrupts; and there are three questions for the consideration of the Court—first, whether there is a general partnership; secondly, whether the transactions between the parties were of the nature of partnership transactions; and thirdly, whether the conduct of the respondent is such as to entitle him to be considered a creditor of the assignees. [After going through the agreement, Sir John Cross continued]—I am of opinion that they did not become general partners. The first clause in the proposed articles provides for that, and I find, that the bankrupts acted accordingly. I also find, that the advance made with the bankrupts was in accordance with the articles; but I find, that the bankrupts, in all their subsequent transactions, considered themselves as debtors. And I find, that the bankrupts acknowledged a debt whereon a judgment was issued. The evidence of one of the bankrupts is quite at variance with their previous conduct. But the greatest stress is laid on the evidence of Mr. Fletcher, between whom and the respondent there was the closest friendship, which afterwards was changed into the strongest animosity. I do not mean to say he wilfully misrepresented certain conversations, but that he mistook them. He states, that when the bills were first drawn by him on the bankrupts, Mr. Evil represented that he was about to join them in partnership. Now here, therefore, it is quite clear that he had no notice of a partnership when he drew the bills. He then goes on to say, that he distinctly told me that his name was represented by "Co." Now, the very slight

variation in words of "would be" in place of "was," would make all the difference; and that it was to be a secret, clearly shewed that he did not hold himself out as a partner. Taking the expression to its utmost extent, it was only an acknowledgment to one party. And upon the whole, it is the order of the Court, that the petition shall be dismissed, with costs, against the petitioner, but that the assignees should have theirs out of the estate. As this question involves a case of fact, I have the more satisfaction in confirming the commissioners in the view they took of the case after close investigation.

November 26.—*Mr. Russell* referred to the opinion of the Court, that there was no partnership, and stated that an action at law was about to be tried, wherein counsel were confident that a partnership would be established; and the prayer of the present petition was, that the order of dividend be stayed for ten days.

The COURT.—You may have the order.

December 10.—*Mr. Russell* applied for a further postponement of the order, on the ground that the action at law had not yet been tried.

SIR JOHN CROSS.—The pleadings in the action do not necessarily involve the question of partnership; and even if it did appear in the progress of the cause that there was a particular partnership, *non constat* that it would make any difference in the opinion pronounced by the Court.

Motion refused.

1841. }
Nov. 5. } *Ex parte BATES re BATES.*

Infant, Fiat against.

The Court will not supersede a fiat issued against an infant, where he has held himself out as an adult, and made a declaration on oath to that effect.

This was the petition of the bankrupt, an infant, by James Massey, his next friend, praying to annul the fiat, on the ground of infancy. It appeared, however, that the

bankrupt had traded and held himself out as an adult; and on the occasion of his marriage, he had made a declaration on oath that he was of full age.

Mr. Fitzherbert, for the petitioner.—There is clear evidence to shew that the bankrupt was an infant at the time the fiat issued, and, therefore, not a subject for the bankrupt laws.

[SIR J. CROSS.—How do you get over the fact, that he has held himself out as an adult?]

By shewing from clear and incontestible evidence that he was an infant—by the affidavits of his mother, and the only other person now living who was present at his birth, that he was born on the 16th of January 1821.

[SIR J. CROSS.—Assuming that to be so, he has held himself out to be an adult, and upon a most solemn occasion sworn to that effect. The Court will not now relieve him from the effects of the fiat.]

Mr. Keene, for the assignees and petitioning creditor.—Nothing can be more clear than that a party who has for any length of time held himself out as an adult, may not turn round and plead his infancy: it was so decided in *Ex parte Watson* (1).

SIR J. CROSS.—And the present is still a stronger case, inasmuch as there is a declaration on oath made by the party on the occasion of his public marriage in the church. The petition must, therefore, be dismissed, with costs, to be paid by the next friend of the bankrupt.

1841. }
Nov. 6; } *Ex parte WRIGHT re DAINTRY,*
Dec. 11. } RYLE, AND CO.

Partners—Inspector—Practice.

Case, where the Court after much discussion, ordered a meeting to appoint an inspector, with power to collect the separate estate of one partner, and to bring any action or suit in the names of the assignees of the joint estate, indemnifying them; the money to be paid in to the banker's of the joint estate, with the usual order for leave to use books and papers.

(1) 16 Ves. 265.

Mr. Anderdon applied for an inspector to be appointed for the separate estate of *Ryle*, on the ground, that he represented separate creditors to the amount of 230,000*l.*, whose interests were unprotected since the joint fiat had been taken out; that assignees had been chosen by the joint creditors, whose debts proved did not exceed the sum of 48,571*l.*; that the bankrupt, *John Ryle*, carried on a separate banking establishment at *Macclesfield*, and that although there was a very large separate estate, yet it was by no means sufficient to pay the separate creditors, and therefore the joint creditors could have no interest in the separate estate; that at a meeting of the separate creditors, it was agreed, that if a separate creditor were not appointed an assignee under the joint fiat, to protect the interests of the separate creditors, then that an application should be made to the Court of Review to appoint a receiver; that the choice had taken place under the joint fiat, and as neither of the gentlemen appointed were separate creditors, the petitioners prayed for an order, that a meeting of separate creditors might be called, for the purpose of electing an inspector who should have power to superintend and manage the separate estate; and if the Court thought that he ought not to have such superintendence, then that he should at all reasonable times have access to all books, &c. belonging to the said separate estate.

It was also stated, that several mortgages and settlements were attached to the separate estate, upon which questions might arise wherein the separate creditors were alone interested; and also that the joint estate owed the separate estate the sum of 46,000*l.*; it was therefore hoped that the Court would appoint an inspector, with full powers to protect and administer the separate estate, especially as, pending the present petition, an attempt had been made to sell property belonging to the separate estate, to the amount of 70,000*l.*

[*SIR J. CROSS*.—I understand that there was a distinct separate trade carried on by *Ryle* ?]

Yes, and the dealings far more extensive.

Mr. Russell, *contra*, only wished to ascertain what the powers were, which were sought to be obtained, but certainly would wish to prevent an appointment made under

a vague and undefined order, which would have no other effect than opening the door to endless litigation. An offer had already been made, which would have answered every purpose, namely, that one of the assignees should be chosen out of the separate creditors, which was declined. There was also an affidavit shewing, that, from the length of time which had elapsed since a settlement and mortgage upon the separate estate of *Ryle*, no possible question could arise upon them. In cases where a collision of interest between two classes of creditors might arise, the Court would interfere and take the administration out of the hands of the assignees, as far as a certain well defined act—and that generally upon a statement shewing some default on the part of the assignees; but nothing was alleged here. No objection existed to the appointment of an inspector to investigate the matters concerning the real estate of *Ryle*; also to investigate any matters for proof against the joint estate. But here no good was suggested, and great mischief might arise. In *Ex parte Miles* (1), the joint assignees were appointed by certain bill creditors, whose debts were suspicious.

[*SIR J. CROSS*.—What other powers are wished for more than those now suggested ?]

Mr. Anderdon.—It is now conceded, that a choice be made of a person to be appointed as an inspector, and to administer the separate estate.

[*SIR J. CROSS*.—Can the Court appoint an inspector with all the powers of an assignee ?]

Certainly; the case of *Ex parte Miles*, cited on the other side, shews that the Court will, in cases where a separate interest is to be protected, interfere.

[*SIR J. CROSS*.—I am not aware of any power to appoint an inspector with the full powers of an assignee. I think it highly desirable that you should have one of your body appointed an assignee, and I am willing to give you all the assistance I can.—Here his Honour read the order made in *Fauntleroy's case* (2), which was evidently an appointment for a specific purpose.]

Mr. Anderdon considered that case as not quite applicable, as in that case there

(1) 2 Rose, 68.

(2) Registrar's Book.

were very large funds which had come into his hands by improper means, and the joint creditors were anxious to avail themselves of the funds, and then the Court interfered to the extent required for the protection of those funds. The attempt to sell the estate to the amount of 70,000*l.* in so great a hurry, is here a sufficient ground for requiring the protection of this Court.

SIR J. CROSS.—Would it not be better to have a new choice of assignees by consent, and one of your party be elected? This would obviate all the difficulty the Court feels about appointing an inspector, with all the powers of an assignee. I am exceedingly disposed to assist the applicants. This case had better stand over, for the purpose of coming to such an arrangement.

The case stood over till this day, the 13th of December, when—

Mr. Anderdon stated, that after mature consideration he was instructed to decline the offer of a fresh choice of assignees, as it would only give one voice in three, and as all matters were generally carried by majorities, it would be perfectly inoperative so far as the getting in and protecting the separate estate of Mr. Ryle, which was very considerable. If the case depended simply upon a few facts, as in *Fauntleroy's case*, it might have answered; but there are many actions to bring, and although the assignees of the joint estate might be indemnified, yet it would only be disturbing the joint estate for no purpose.

SIR J. CROSS.—I have no difficulty in appointing an inspector or inspectors, to be chosen at a meeting of the separate creditors, to get in the separate estate, with liberty to bring actions or suits in equity as advised, indemnifying the assignees of the joint estate; such indemnity, if not agreed upon, to be settled by the commissioners of bankrupts; the money, when collected, to be paid in to the banker's appointed for the estate; and the usual order for liberty to inspect and use the necessary books and papers in the hands of the assignees. Costs of both parties out of the separate estate.

1841. }
Dec. 13. } *Ex parte WHITE re HALLIN.*

Solicitor's Lien.

Case where the Court refused to allow the solicitor, who had given an indemnity to the sheriff, who was in possession of some of the bankrupt's effects, to retain the produce of those effects until he was re-indemnified by the assignees.

This was the petition of one of the assignees of the bankrupt, and stated, that the solicitor to the commission had, in the early part of the year 1837, received a sum of 95*l.*, arising from the sale of part of the bankrupt's effects; that he, the solicitor, had refused to pay over the sum to the official assignee, alleging that the sum in question arose from the sale of some goods, which he had employed an auctioneer to sell, but which goods had been seized by the sheriff of Middlesex, to whom the solicitor gave a personal indemnity, and therefore claimed a right to retain the money, until the sheriff had been relieved from any responsibility respecting those goods, or that he was indemnified by the assignees. It also appeared, that the sum in question had been carried to the credit of the solicitor, in a settlement of accounts between him and the auctioneer; and also, that the solicitor had ceased to be the solicitor to the assignees; the prayer of the petition was, that he might be ordered to pay over the money in question to the official assignee, and also pay the costs of the application.

Mr. Russell and Mr. Martindale, for the petitioner, the assignee.

Mr. Anderdon, for the respondent, only wished to retain the money until he was safe, either by the Statute of Limitations, or by the claimants releasing the sheriff, or (as had been offered) until the official assignee gave him an indemnity. He certainly would not consent to give up the money upon the personal undertaking of the creditors' assignee. Besides, it was mainly owing to the exertions of his client, that anything had been saved at all; the goods in question were at the rooms of an auctioneer for sale, under an execution, and the sheriff had refused to accept the guarantee of the creditors' assignee, and his client then gave his own, in order to save the property from being

swept away under the execution. This was nothing but an attempt to obtain the money without any responsibility, and without paying his client a bill of costs subsequently incurred by the assignee, to his client. He hoped the Court would not interfere to make the order.

[SIR J. CROSS.—Is there any evidence of any authority ever having been given by the assignees, for your client to have received the money?]

Nothing but their acquiescence for so long a time. In this case, the assignee does not say he wants the money to divide; neither has he offered to pay the bill of costs which has accrued since; nor offered to pay the money into a bank in their joint names; all prayed for, is the money. He hoped, therefore, the Court would not interfere to deprive his client of his lien, but make this a good and proper precedent, to shew that the Court will protect the interests of a solicitor who has incurred responsibilities in the discharge of his duty.

SIR J. CROSS.—In this case, the solicitor to the fiat has received a sum of money, which he has declined to pay over to the assignees; and it is not for me to determine whether the application on the part of the assignees is ungracious or not. It appears that the solicitor received the money, and applied it to his own use some years ago, and he now contends that he has a right to retain it, but we have no proof of the indemnity he is said to have given to the sheriff, or that the assignees ever authorized him to do so; and it was quite out of his ordinary business of a solicitor to have given such an indemnity; but having done so, he might have thought that he had a right to apply the money to his own use, and retain it for six years, until the sheriff was secured by lapse of time. It has been urged, that the official assignee has not been joined in this application: the Court always discourage official assignees joining in petitions or any litigation. It appears to me, that no justification has been made out. With regard to the lien, if an attorney wrongfully gets money into his hands, he cannot then fall back, and say he has a lien.

The Court recommended the assignees to pay the solicitor's bill, but would make no

order upon the subject. The order upon the petition was as prayed.

1841. }
Dec. 13. } NEWTON *re* NEWTON.

Proof—Bill of Exchange—Action.

A creditor for goods sold, who has received bills for the amount, may prove for part, and proceed at law for the other—(confirming Ex parte Sly, 2 Glyn & Jam. 163).

This was the petition of the bankrupt, for the purpose of staying an action brought against him by Mr. Julian Reinholt, one of his assignees, and a creditor under his fiat; and it stated, that previous to his bankruptcy he had dealt with Reinholt in the way of his business as a merchant, during which dealing certain bills of exchange were accepted and indorsed over to him by the petitioner, and an account current stated between the two was delivered on the 27th of May 1841, in which he debited the petitioner in the sum of 3,190*l.* 18*s.* 8*d.*; of that sum the petitioner paid off before the issuing of the fiat 1,459*l.*, leaving a balance of 1,731*l.* 18*s.* 8*d.* due; but Reinholt having credited the petitioner in the account current with the bills of exchange accepted and indorsed by him, the balance on that account was only 11*l.* 18*s.* 8*d.* against the petitioner. At the first public meeting, Reinholt proved for four bills of exchange, credited in the general account current, amounting to 800*l.*; and Messrs. Jones & Son proved other bills of exchange also credited in such account, and which had been indorsed and passed to them by Reinholt, amounting to 300*l.* On the 15th of October, Reinholt commenced an action in the Court of Exchequer, to recover the sum of 629*l.*, the amount of four bills of exchange, included and credited in the general account current; and the petition prayed, that Reinholt might be restrained from taking any further proceedings in the action at law commenced by him against the petitioner, in respect of any bills of exchange or other securities, or any items of demand comprised in or arising upon the general account current.

Mr. Keene, for the petitioner.—Nothing can be more certain than, that a person cannot prove and have an action at law for the same demand. Had this creditor commenced an action, and even taken the bankrupt in execution, the proof would have been a relinquishment of all the remedies he might have availed himself of by the action—*Ex parte Moore* (1). All these bills were contained in the stated account given before the bankruptcy, and surely he cannot sever his demand after having proved. If he had not stated the bills at the time of proving, the debt would be expunged—*Ex parte Hossack* (2). It is only when debts are of a distinct nature, that some can be proveable under a commission, and an action sustainable upon the others; here they are all included in one general account. In *Ex parte Sly* (3), there does not appear to have been any account stated before the bankruptcy; but in *Ex parte Dickson* (4), where two bills had been given for the same debt, and the creditor proved for one of them, having previously taken the bankrupt in execution upon the other, the Lord Chancellor ordered the bankrupt to be released out of custody, but without prejudice to proof under the commission, as it was a remedial statute.

Mr. Anderdon, for the respondent, relied upon *Ex parte Sly*, as a case directly in point. The respondent had been obliged to pay these bills since the bankruptcy, and, according to the doctrine laid down in that case, they were assignable debts; and having been assigned before the bankruptcy, the holder of the bill was the creditor until he had received payment from the indorser, *Mr. Reinhold*, who, upon paying them, stands in the place of the indorsee.

SIR J. CROSS.—This is a petition by the bankrupt, complaining that a creditor who had proved a debt, and been appointed an assignee, had also brought an action at law on four bills of exchange, for 650*l.*, a portion of the same identical debt; and he prayed of the Court to issue an order, directing all further proceedings in such action to be stayed. It has been said in the course

of the arguments, that a similar application for the purpose had been made to one of the common law Judges. I should like to know how the fact stands.

Mr. Anderdon said, that an application had been made to a Judge at chambers, but it had been refused; the applicant being referred to the Court, and he thought the Court of Review was intended.

SIR J. CROSS.—If there has been a refusal by a Judge to stay the proceedings, the matter is disposed of.

[The solicitor for the respondent mentioned to the Court, that the Judge had said, that he had not the power to make an order to stay the proceedings.]

SIR J. CROSS.—I have looked over the authorities with an anxious wish to give a liberal construction to the act of parliament, as was proposed by Lord Eldon, in *Ex parte Dickson*. The question was, whether there were two debts, or merely parts of one and the same. The only cases applicable to the point were, *Ex parte Dickson* and *Ex parte Sly*. All other cases related to distinct debts. Was the debt proved, and that for which the action was brought, one and the same? In *Ex parte Dickson*, there were two bills for the same debt; and it was contended, that the party had elected, in proving a debt, and could not go farther with the action. This case was quoted and discussed in *Watson v. Medex* (5). As to the first question, whether the two were parts of the same or distinct debts, I feel unable from the accounts to say how the fact stands; and if the case depended upon that, it would certainly have been requisite to have gone into a farther inquiry. But whether there were different debts originally or not, *Sir John Leach*, in *Sly's case*, decided, that there was no substantial difference. The consideration is, was the whole one debt? Did it remain so? Here, apparently, it was one and the same debt. But it has been decided, that the bill proved, and the bill that came back to the creditor, constitute distinct debts. I feel bound by that authority, and am, therefore, under the necessity of dismissing the petition, but it should be without costs.

(5) 1 B. & Ald. 121.

(1) Buck. 521.

(2) Ibid. 390.

(3) 2 Glyn & Jam. 163.

(4) 1 Rose, 98.

1841. }
Nov. 8. } *Ex parte* ROGERS *re* ROBBINS.

Practice.—Proof under Special Agreement—Retainer of Dividends.

Where the payment of a debt has been postponed for a given time, as an indemnity to the debtor against a contingent loss, the debt may be proved, but the dividends will be retained in the meantime.

This was the petition of the vendor of some freehold property, which the bankrupt had purchased some years previous to his bankruptcy. On that occasion it had been agreed between them, that as there was a defect in the title, 400*l.* should be retained by the bankrupt for ten years, he paying interest for the same in order to meet any expenses that might be incurred, owing to that defect. It had been also agreed, that the vendor should not have any lien for that sum; and the application was for leave to go in and prove the debt of 400*l.*

Mr. Haig, for the petitioner.

SIR J. CROSS.—You may take an order for proof; but inasmuch as the time stipulated has not yet expired, the assignees must retain the dividend until some further order be made by this Court.

1841. }
Nov. 14; }
Dec. 10. } *Ex parte* SAUNDERS *re* BRACHER.

Practice.—Exceptions to Registrar's Report—Scandal and Impertinence.

The way to except to the registrar's report, is to file the exceptions, giving the party notice. The original petition is then set down for hearing, together with a petition to confirm the report, which, with the exceptions, come on together.

Reference to the registrar to find impertinence and scandal. The registrar reported some parts impertinent, some scandalous, and some impertinent and scandalous:—Held, to have exceeded his authority in finding simply, either scandal or impertinence.

Mr. Montagu Chambers applied for the direction of the Court of Review, as to the proper mode of taking exceptions to the

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registrar's report, as it was not quite settled in those cases what the practice of the Court was: whether the exceptions should be filed and then set down to be argued, or whether the Court would, on application, order the original petition to be placed in the paper, and the exceptions then argued.

Mr. Anderdon (amicus Curiae).—The usual mode is, for the petition to be presented to confirm the Master's report, when the exceptions must be filed, and they come on to be argued together with the original petition.

SIR J. CROSS.—That has generally been the practice. Let the original petition be placed in the paper for hearing, and the petition to confirm, with the exceptions, can come on at the same time.

Dec. 10.—These exceptions came on to be argued. The affidavits had been referred to the registrar to inquire, and state whether any portions of them and of the petition were *impertinent and scandalous*; and the registrar returned on his report, that certain portions of the affidavits were impertinent, and that other portions of them were scandalous, and that some parts were both impertinent and scandalous.

Mr. Anderdon, in support of the report, urged, that the finding of the registrar had been correct, and prayed a confirmation of the report.

Mr. Elderton, *contra*.—This report cannot be confirmed. The registrar has exceeded his authority. The reference to him was to inquire, and state what was impertinent and scandalous, and not what was simply impertinent, or simply scandalous.

SIR J. CROSS.—The Court referred, according to the words of the order of reference, to find if any parts of the petition and affidavits were impertinent and scandalous, and did not refer to the registrar to inquire what was impertinent only; but, if there is a considerable portion of the affidavits expunged as impertinent only, which I, after reading, consider to be so, I shall not make any order for costs in respect of such portion. The Court confirms the report as to all the matter that has been found both impertinent and scandalous, and orders such matter to be expunged with costs, but reserves the costs

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on that portion of the report where the registrar has found impertinence only, until after the hearing of the petition.

1841. } *Ex parte GATTON re GATTON.*
Dec. 8, 9. } CHARGE respondent.

Fiat—Supersedeas—1 & 2 Vict. c. 110.

Where the creditor keeps out of the way to avoid being paid the money until after the twenty-one days have expired, the Court will supersede the fiat, with costs.

This was the petition of the bankrupt, complaining that he had been the victim of an improper attempt to involve him in bankruptcy, for purposes foreign to the objects of the bankrupt laws. The petitioner was clerk to the Chesterfield Canal and Navigation Company; the respondent, John Charge, was the solicitor to the company, and a member of it. In 1828, certain property was mortgaged by the petitioner and his wife to Mr. Charge, and interest was regularly paid on the mortgage security, which was so unexceptionable, that the mortgagee was content to diminish the rate of interest from 5 to 4½ per cent. The bankruptcy was not rested on any existing trading, but on a former trading as a brick-maker, by introduction of foreign materials in his own brick-yard, in 1828. An affidavit of debt was made, and a notice thereof, pursuant to the statute 1 & 2 Vict. c. 110. s. 8, was given by Mr. Charge, who then left home without giving any instructions as to receiving the money. The petitioner, within twenty-one days, attended at the respondent's office, and tendered the amount of his debt in notes of a country bank, which were refused, and having then exchanged the same for Bank of England notes and gold, he again visited the office where his creditor's business was regularly transacted, and again tendered payment, but found no one in Mr. Charge's employment willing to receive the money, and after the twenty-first day the fiat was issued.

Mr. Anderdon and Mr. Fitzherbert, for the petitioner.—The Court will never sanction such an abuse of the process of bankruptcy. Nothing can be more certain, than that the petitioning creditor is himself a

mere instrument in the hands of others. It must be borne in mind, that during the whole time, that is, the twenty-one days, the debt was secured by an indisputable security, which is one of the modes of relief contemplated by the act. Will the Court allow a man to sue out a fiat who has a sufficient security for his debt, and who has not proposed to prove any debt under the fiat issued at his suit, but has merely served the objects of other individuals? Can a party be allowed to make his own default an act of bankruptcy against another? An affidavit of non-payment after demand was sworn in Yorkshire, on the twenty-first day, though, by the act of parliament, the time was not complete until the twenty-second day. The party thus speculating on non-payment, transmitted docket papers to London, and a fiat issued two days afterwards. A previous attempt had been made by the company to make the petitioner a bankrupt, on a demand arising on a complicated account; but this presented so much difficulty, that it was thought more eligible to take advantage of Mr. Charge's services. Ought this process, under the 8th section, to be allowed to a man who might have been paid, but would not be paid; who had ample and abundant security, but who yet thought fit to take this proceeding against a gentleman who had long since retired from business? The cases of *Ex parte Brown re Powell* (1), *Ex parte Budd* (2), and *Ex parte Hall* (3), go to shew, that the Court will controul the improper use of this process. The fiat originated in motives the Court will not allow; and, if rightly issued, the default was occasioned by the conduct of the individual who seeks to take advantage of his own absence. As the money was refused, surely he cannot be allowed to say his demand has not been satisfied. He was absent thirteen out of the twenty-one days, and only returned home on the day after the lapse of the period.

Mr. Bacon and Mr. Goodeve, for the petitioning creditor.

Mr. Russell and Mr. Cockerell, for the assignees.

Cur. adv. vult.

(1) Mont. & Ch. 177.

(2) 1 Mont. Dea. & De Gex, 436; s. c. 10 Law J. Rep. (n.s.) Bankr. 17.

(3) 3 Dea. 405; s. c. Mont. & Ch. 365; 8 Law J. Rep. (n.s.) Bankr. 5.

Dec. 8.—SIR JOHN CROSS.—This was a petition to supersede, on the ground of there being no act of bankruptcy; and the matters in dispute were narrowed to the question, whether the act of bankruptcy alleged was, within the meaning of the statute, a default of payment within twenty-one days after demand. Mr. Charge held a mortgage on the estate during thirteen years, and interest was punctually paid on a loan of 2,000*l.*, at 5 per cent. The last half-year's interest not having been paid at the usual time, an application was made, upon which formal notice was given by the mortgagor to pay off the incumbrance within six months. Mr. Charge had no inclination to be paid off, and returned no answer. Subsequently he sent a demand for payment of the whole within three weeks, on penalty of bankruptcy. It was said by the counsel for the respondent, that he did not expect payment. His object appeared to be to avoid it. The parties were neighbours, and for a week the respondent remained on the spot, during which time the petitioner did not succeed in obtaining the money; but having, at the end of the week, given notice at the local bank for realizing certain funds, Mr. Charge took his departure forthwith for the next fortnight to a day. Being unwilling to be paid, he left, and locked up the mortgage deed, which might have been required by the petitioner. Mr. Charge denied an intention to avoid payment, but his absence had that effect. The debtor was anxious to pay, the creditor not to receive. On the eighteenth of the twenty-one days, the money was ready, having been previously tendered in country notes, and then changed for other notes and gold, and the debtor was prepared to pay Mr. Charge, or his agent, if there had been any one to receive it. But receipt was not intended,—the clerks refused to accept. But was not the office the proper place to tender it? The money was produced and counted. Mr. Charge has not ventured to deny his knowledge of the tender, and no doubt he knew of the circumstance. He departed on the eighth and returned on the twenty-second day. It was clearly his object to delay payment beyond the twenty-one days; and it is equally clear, that the debtor had the inclination and the ability to pay within due time. Non-payment was the act of the creditor,

entirely his own, and not that of the debtor. The petitioning creditor was a consenting and concerting party to the act of bankruptcy, which was, therefore, not available to him, and the fiat must be superseded, with costs.

1842. } *Ex parte* STALLARD AND OTHERS
Jan. 12. } *re* FREELAND.

Assignees, Choice of.

The commissioners have no authority to prevent a creditor, who may have an interest adverse to the rest of the creditors, from voting in the choice of assignees, under 6 Geo. 4. c. 16. s. 61.

This was the petition of Messrs. Stallard & Co., and of Messrs. Sayer and Barber, complaining that the former had been excluded from taking part in the choice of assignees, and praying that the choice, which had been made by the minority, might be set aside; and that Sayer and Barber, who had at the meeting for the choice of assignees been nominated by the majority, might be declared to be the assignees. It appeared that Messrs. Farley, Lavender, and Owen, the petitioning creditors, were bankers at Worcester, where the bankrupt Freeland kept the Crown Hotel, of which Mr. Wm. Stallard, of the firm of Stallard & Co., wine-merchants, was the landlord, and the bankrupt, at the date of the fiat, was indebted to Mr. W. Stallard, on his separate account, in 1,174*l.*, and to the firm of Stallard & Co. in 750*l.* On the eve of the bankruptcy, an execution on a warrant of attorney, in favour of Mr. W. Stallard, was levied, and the entire property of the bankrupt swept away to the value of 900*l.*; on the part of the petitioners it was shewn, that the commissioners had rejected the votes of Stallard & Co., and appointed the parties chosen by the minority, whose debts only amounted to 396*l.*, as it was alleged that they were about to commence proceedings to set aside the execution, on the ground of illegality.

Mr. Anderdon and Mr. Cameron, for the petitioners.—The proceedings of the commissioners were altogether irregular: if they had not approved of the choice which would have been made if the petitioners' votes had

been admitted, they should have adjourned the choice; they exceeded their authority in rejecting the votes of the petitioners. As it appears to the Court who the parties were that would have been elected if the petitioners' votes had been accepted, the Court is asked to declare them duly elected without directing another choice, which would lead to the result now asked.

Mr. Rolt, for the respondents.—The creditors viewed the execution sued out by Stallard as invalid, and were anxious to inquire into the matter, which they could not do if the assignees proposed to the Court were to be appointed, inasmuch as they were parties entirely under the controul and influence of Messrs. Stallard & Co. If the principal petitioners' nominees were appointed, the fiat would be at an end, as there would be nothing left to administer; the creditors looked forward to the chance of overreaching the execution, as their only chance of a dividend; and the commissioners have, in the exercise of their discretionary power, excluded those parties from voting in the choice, instead of allowing them to exercise that privilege, and negativing the choice.

SIR J. CROSS.—This may be a good objection against choosing *Mr. Stallard* as an assignee; but it is contended, that it is sufficient to prevent him using his undoubted privilege of voting in the choice of assignees. It is not alleged, that the persons chosen by the majority of the creditors had any personal interest adverse to the general interest of the creditors, but merely that they are friends of parties who had an adverse interest. It is to be lamented, that the commissioners have not entered the account of the transactions upon the proceedings; but, as it stands, they appear clearly to have acted upon an erroneous impression of their authority. I am therefore bound to declare, that Messrs. Sayer and Barber, the parties chosen by the real majority of the creditors, are the assignees, and must be substituted forthwith. The respondents may apply, if they think fit, to appoint an inspector, but at present there is nothing to impeach the rights of the assignees now declared in authority. As the commissioners appear to have acted under an erroneous impression, the costs of both parties may be allowed out of the estate.

1842. }
Jan. 11, 12. }

Ex parte HAMPSON re
BURKILL.

Proof—Clerk's Salary—Commissioners.

Semble—It is not competent for the assignees to withhold the payment of wages or salary to a clerk or servant, upon an alleged case of neglect of duty, unless prepared to go into evidence to shew such neglect. If not, the allegations to that effect will be struck out by the Court as scandalous and impertinent.

This was the petition of a clerk of the bankrupts, praying for an order upon the assignees, to pay him the amount of his salary ordered by the commissioners. In answer to this, the assignees filed an affidavit, stating, that "if the accounts were duly investigated, property to a considerable amount would be found to have been lost or wasted by the misconduct of the person employed." On a former occasion, it was referred to the registrar, *Mr. Ayrton*, to report whether the allegation was scandalous or impertinent. *Mr. Ayrton* reported that it was impertinent, but not scandalous; and the petition came on for further directions.

Mr. Ellis, for the petitioner.—This is a very hard case upon the petitioner, as the assignees not only withhold from him his salary, which he has earned, but have filed upon the proceedings what amounts to a gross imputation upon the petitioner's conduct as a clerk, which would materially injure him in his avocation as a clerk; and this without any attempt or offer to prove anything specific, but merely contenting themselves with the sweeping allegation complained against, wherein they say, "If the accounts were duly investigated, property to a considerable amount would be found to have been lost or wasted by the petitioner;" but they do not undertake to prove this—on the contrary, they allege as an excuse the great expense such an investigation would throw upon the bankrupt's estate.

Mr. Anderson, contra.—If this Court were to look so strictly into all points of pleading, it would paralyze all the functions of the Court, inasmuch as scarcely a petition is ever presented, but that some part of the affidavit in answer might be referred for impertinence. This motion can have no

useful purpose. It surely is competent for the assignees, upon the issue why they have not paid the petitioner his salary, to shew, that it was in consequence of his misconduct. Since the issuing of the fiat, a large sum has been lost to the bankrupt's estate; and as it has never been decided at what particular time, under the act of parliament, the wages of a servant ought to have reference to, his negligence since the bankruptcy is a sufficient excuse for the assignees not paying the salary ordered.

SIR JOHN CROSS.—The clerk has obtained an order to receive a sum of 31*l.*, alleged to be due for wages in the bankrupt's service; the order was altogether *ex parte*; the assignees made no opposition by appearing in court to dispute the claim, but they refuse to pay the money. The petition before the Court seeks to compel the assignees to comply with the order for payment. It is not requisite to say how far an assignee may go in defence against the complaint, if able to shew that the party has so misconducted himself in the bankrupt's service as to have earned nothing, as has been suggested. I should hardly be prepared to say such misconduct did not fairly come in question, if it were proposed openly to discuss such a point: but what makes the present proceedings unfair, as touching the complainant's means of life as a clerk, is, that the affidavit alluded to and impeached alleges, that if the accounts were duly investigated, property to a considerable amount would be found to have been lost or wasted by the misconduct of the person employed. If it had been proposed to shew this on the hearing, so far well and good: the point could be discussed and decided, if properly mooted; but the assignees avoid that course, saying, they are unable, in consequence of the expense which must be incurred in such an investigation. They throw out an imputation against a party, without any indication of an attempt to prove it. There is no distinction between this and *Simpson's case* (1), which has been alluded to, where an individual was described in an affidavit as "one of a gang of swindlers;" and where the individual taxed with the unfairness of the charge merely said, "Oh! deny it, and take

the sting out thereby." In the present case, there appears to have been an unnecessary and wanton imputation on the character of the party complaining; and though I should be sorry unnecessarily to restrict discussion, still, as no evidence is tendered, and the offensive allegation appears to have been made for no useful purpose, in all fairness and justice, as the respondents abandon all intention of proving the charge, it ought to be struck out as both scandalous and impertinent. The other passages complained of cannot fairly be dealt with as such.

1842. } *Ex parte* JUNGMICHEL *re*
Jan. 15. } CARTER.

Third Commission—Practice.

*Where a party has been twice a bankrupt, and is allowed to trade and create fresh liabilities, and a third fiat issues against him, the Court will not interfere, in favour of the assignees under the second commission, to give them the assets collected under the third, although the bankrupt may not have paid 15*s.* in the pound under the second. See Ex parte Bourne, 2 Glyn & Jam. 137.*

This was the petition of the assignees under a second fiat issued against the bankrupt, under which 15*s.* in the pound had not been paid; and it claimed to be entitled to the funds in the hands of the official assignee under a third fiat; and prayed for an order restraining the official assignee from making any dividend, or disposing in any manner of the property belonging to the bankrupt in his hands.

It appeared, that the bankrupt had carried on business up to December 1829, when a commission issued against him, under which he obtained his certificate. In October 1834 he again became bankrupt, and a fiat was issued against him, under which Mr. Greene was appointed official assignee, and the petitioners creditors' assignees. Debts were proved to a large amount, and a small dividend declared; but even with the addition of the funds now sought to be recovered, the payment to creditors would scarcely amount to 5*s.* in the pound. The second certificate was granted in July 1835. In February 1840 he became bankrupt for the

(1) 15 Ves. 476.

third time, and the fiat now in prosecution issued, and Mr. Greene was again appointed official assignee, but no one had been selected by the creditors. The petitioners, having ascertained that a sum of 199*l.* had come into the hands of the official assignee, applied for leave to receive the same, under the power of the 127th section (6 Geo. 4. c. 16); but the application to the commissioner did not meet with a decisive result. The petitioners now denied that there had been any trading by the bankrupt, within their knowledge and cognizance, since the second bankruptcy.

Mr. Bacon and Mr. Rogers, for the petitioners.

Mr. James Russell, for the respondent, the petitioning creditor, at whose suit the third fiat had issued, stated, that the commissioner had decided, that the property in dispute ought to be divided under the third commission, and had accordingly appointed a dividend meeting, though no creditors' assignee had been appointed. His client claimed to retain this property by virtue of reputed ownership by the bankrupt, with forfeiture of their rights by the petitioners. The affidavits shewed the notoriety of the trade and the possession of the property, with evidence of communications between the bankrupt and his former assignees. He relied on the decision in the case of *Butler v. Hobson* (1).

Mr. Petersdorff, on the same side, cited *Lingard v. Messiter* (2), and *Muller v. Moss* (3).

Mr. Bacon, in reply.—It is certain, that if the assignees had been ignorant of the trading, their right would have been indisputable. How, then, is it to be contended that their knowledge is to bar the rights of the other creditors, their *celles que trust*? Besides, the trading alleged in *Aldermanbury* was merely that of a Blackwell-hall factor; therefore, the assignees could have had no right against the goods in his hands.

SIR JOHN CROSS.—This is a petition by the assignees under a second commission, claiming certain funds in the hands of the respondent, an assignee under a third fiat.

(1) 4 Bing. N.C. 290; s.c. 7 Law J. Rep. (N.S.) C.P. 148.

(2) 1 B. & C. 308; s.c. 1 Law J. Rep. K.B. 121.

(3) 1 Mau. & Selw. 335.

The bankrupt obtained his second certificate in 1835. I shall not say anything about the trading as a Blackwell-hall factor, as he traded as a tailor and draper in Cheapside, which continued up to 1840—a period of five years after the delivery of the certificate. In that year, the bankrupt became again a bankrupt, at the suit of new creditors, after contracting debts to a large amount, chiefly on bills of exchange, for the purchase of goods. The assignees under the former fiat never interfered until the assignee under the third fiat was about to make a dividend. They never questioned the bankrupt's proceedings, or raised any point affecting his right to contract new debts with liabilities to other creditors. When proceedings have been taken under a third fiat, where the assignees have incurred all the costs, amounting to a liability of nearly 100*l.*, and where there remained only a small sum beyond the amount of the expenses, then the assignees under the second commission are prepared to step in and claim the assets. The respondent assignees rely on the right under the 72nd section, and the petitioners claim under the 127th section of 6 Geo. 4. c. 16, which gives a right over funds accruing, where the bankrupt has not paid 15*s.* in the pound under his second commission. I felt some difficulty in deciding the question of law, where there was a conflict between two sections. It is not, however, requisite to dispose of the case by any decision on the rights of the parties under the two clauses, but merely as a question of equity between the parties, without reference to the words of the act. In *Troughton v. Gilley* (4), the question was, whether the creditors under the commission had not lost their authority; and Lord Camden held, that they had ceased to retain a right of priority. That case was before the statute. Subsequent to the present act, in *Bourne's case* (5), Lord Eldon made an equitable interference on the two commissions, without acting on the strict law as applicable to the case. The present case is stronger, and must be governed by the decision in *Bourne's case*. The evidence shews a notice to the solicitor, under the second commission, of setting up a trade, as also to the official assignee, with an appli-

(4) Amb. 630.

(5) 2 Glyn & Jam. 137.

cation soliciting their custom. The applicants never appear to have thought of taking advantage of acts done in pursuit of the renewed trading. There was an entire forbearance by the former assignees, who clearly never intended to enforce any rights against the bankrupt. The assignee under the third commission was allowed to take exclusive possession of the bankrupt's property; and after expenses had been incurred, a latent claim is set up, which had never been suggested before. It would, therefore, be contrary to equity, to order the property to be given up to them. The creditors under the third fiat have a better right, and are entitled to priority. Mr. Greene (the official assignee), as a stakeholder, has done right in bringing the parties before the Court.

Costs of both parties out of the estate.

1842. }
May 11. } *Re Humberstone.*

Practice.—Substitution of Petitioning Creditor's Debt.

A party who is disputing the validity of the petitioning creditor's debt in an action at law, brought against him by the assignees, is not entitled to an order, that no proceedings should be taken for the substitution of another petitioning creditor's debt, without notice to him.

Mr. Anderson applied to the Court on behalf of Edward Molineux, who was a defendant in an action of trover brought by the assignees of the bankrupt, for an order to prevent any substitution of a new petitioning creditor's debt, or any order relating thereto, being made without notice to him. The petitioning creditor's debt was in issue in the action, and an order for substituting a new petitioning creditor's debt had been made under the 18th section of 6 Geo. 4. c. 16. That order having been ineffectual, for some cause which was not stated on the motion, it had been amended pending the action, and the defendant in that action was desirous that no more orders should be made without notice to him, he having commenced his defence on the understanding that there was no legal debt. He relied on—

Ex parte Watson re Clarke, 3 Mont. & Ayr. 609; s. c. 3 Dea. 310.

[SIR JOHN CROSS.—Why do you not apply to set aside the order?]

Because there was no impropriety in the order; the parties were not bound to give notice. He also cited the case of *Re Harper* (1).

SIR JOHN CROSS.—I do not think this is a matter in which the Court ought to interfere: the law must take its course.

Motion refused.

1842. }
May 11. } *Re ROMNEY.*

Fiat—Affidavit of Petitioning Creditor.

Semble, a fiat may issue upon the affidavit of the petitioning creditor, sworn in Scotland.

The officer having refused to issue a fiat, in consequence of the affidavit of the petitioning creditor having been sworn in Scotland,—

Mr. Anderson applied to the Court for its direction, that the fiat should issue, and referred to the 1 & 2 Will. 4. c. 56. s. 34, which authorized a creditor residing out of England, to prove his debt by affidavit, sworn before a magistrate where such creditor shall be residing, which might be considered as having controuled the provision of the 6 Geo. 4. c. 16. s. 13.

[SIR JOHN CROSS.—It is clear, that that statute is only directory, otherwise it would be necessary, at law, to prove that the debt appeared on an affidavit.]

All the law requires is, the sanction of an oath of the existence of the debt; the bankrupt could not be damnified.

SIR JOHN CROSS.—If it depended solely on the first act, I should think it clear; but as it is the first case that has occurred, I shall take time to consider.

May 12.—SIR JOHN CROSS.—Mr. Anderson, you applied yesterday, that an affidavit made in Scotland should be a sufficient ground for the issue of a fiat. It would be proper that such application should be made to the Judge in equity, on whose authority the fiat issues. It is an innovation; and since the 1 & 2 Will. 4. it is the first case in which there has been an attempt to depart

(1) 1 Mont. Dea. & De Gex, 239.

from the usual practice. I cannot now make the order.

[It is understood, that an application was afterwards made to the Lord Chancellor, who directed the fiat to issue.]

1842. }
May 26. } *Ex parte* SMITH *re* HILDYARD.

Equitable Mortgage—Service of Petition.

A party having the possession of title deeds, as equitable mortgagee, with a memorandum of deposit, may make an equitable mortgage of his interest in them by a simple deposit of the deeds, without delivering over the memorandum.

The petition of an equitable mortgagee for a sale need not be served on an incumbrancer, whose title was prior to that of the mortgagor.

The petition of Messrs. Smith and Co., bankers of Lincoln, stated, that certain title deeds had, previously to March 1839, been deposited with the bankrupts by one Robert Harrison, to secure a debt due to them, and that such deeds were, on the 22nd day of that month, deposited by the bankrupts with the petitioners, to secure any sum they might advance to them, and they signed a memorandum to that effect. The estates to which the title deeds related were subject to an annuity of 40*l.* and a legacy of 300*l.* at the time they were deposited with the bankrupts. A sum of 512*l.* 7*s.* was due on the security at the date of the fiat.

Mr. Bacon, for the petitioners, asked for the usual order for the realization of his equitable mortgage, with liberty to prove for any deficiency.

Mr. Keene and Mr. Rok.—The Court cannot order a sale in the absence of the parties interested in the annuity and legacy. The bankrupts were themselves only equitable mortgagees, and they could not, therefore, by depositing the deeds, create an equitable mortgage in favour of third persons, especially as it does not appear that they deposited the memorandum to themselves with the petitioners; there ought to have been an express assignment of the deposit.

SIR JOHN CROSS.—The deposit of the title deeds appears to me to be a pledge of all the interest which the pledger had in

those deeds; and therefore it is quite unnecessary to give the memorandum of deposit. The deposit of the deeds did not imply a pledge of the interest of other parties, but only of that which the bankrupt had. The petitioners are, therefore, entitled to the usual order; this is not a new case—it has been decided before (1).

1842. }
May 26. } *Ex parte* HARRIS *re* OSBALDISTON.

Costs—Proof against Bankrupt Trustee.

A bankrupt trustee guilty of a breach of trust, is not entitled to his costs of appearing on a petition, by the cestui que trusts, for liberty to prove against his estate.

Leave given for a third person to prove against the estate of a bankrupt trustee, though there was a solvent co-trustee.

It appeared that the bankrupt and William Lloyd Thomas were trustees of certain funds for the petitioners.

In a suit in Chancery instituted against the bankrupt and his co-trustee, an order had been made on the bankrupt to pay into that court some trust monies which he had appropriated, and at the date of the fiat he was in contempt for not having obeyed the order. The petition prayed, that one Richard Watson Bullock might have liberty to prove the amount of those sums on behalf of the *celles que trust*, who were under the disabilities of coverture or infancy. It appeared that the co-trustee had not acted.

Mr. Elderton, for the petitioners.

Mr. Dixon, for the petitioning creditor, objected, that the co-trustee ought to prove.

Mr. Keene, for Thomas, the co-trustee.

Mr. Grove, for the bankrupt, asked for his costs, and stated that the petitioners had required from him an undertaking to appear.

SIR JOHN CROSS.—You were in contempt of the Court of Chancery, for not bringing the money into court. You were guilty of a breach of trust. I cannot, therefore, give you your costs. The petitioners must pay the costs of the other parties.

Order according to prayer.

(1) His Honour did not mention the name of the case, but the reader is referred to *Ex parte Newton*, 4 Dea. & Ch. 138; a. c. 2 Mont. & Ayr. 51; 4 Law J. Rep. (N.S.) Bankr. 16; and *Massey v. Moss*, 1 Hare, 319.

1841.
Nov. 12. } *Ex parte* MAY, by next friend,
1842. } re MAY.
May 25. }

Practice.—Certificate of Conformity.

Where the bankrupt becomes lunatic, the certificate will be allowed and confirmed on an affidavit made by a third person on his behalf.

This was the petition of the mother, as next friend to the bankrupt, who had become insane, stating that the requisite number of creditors had signed the certificate of conformity, and that a sufficient dividend had been made to pay 12s. in the pound; but that, owing to the insanity of the bankrupt, he was not able to make the usual affidavit that the certificate had been obtained without fraud.

Mr. Keene, for the petitioner, moved that the allowance might be made without the usual affidavit—*Ex parte Currie* (1).

SIR J. CROSS.—It appears to me, that the statute does not make it necessary for the commissioners to have the affidavit of conformity produced to them, before they sign the certificate, but that it only requires this Court to have such an affidavit, before the certificate is allowed. However, if the bankrupt is in such a state of incapacity as to render it impossible for him to make such affidavit, it seems only a reasonable construction of the act, to hold that the words, "the bankrupt shall make such affidavit," shall mean cause such affidavit to be made; and if another person can make such an affidavit to the same effect, it will be, under the circumstances, sufficient, with the commissioner's certificate. I have suggested this course, under the impression, that without such an affidavit as I have mentioned, the object of the legislature would be defeated.

May 25, 1842.—The case was mentioned again this day, when—

Mr. Keene applied for the confirmation of the certificate, on the affidavit of the solicitor to the assignees, that it was obtained fairly and without fraud.

(1) 10 Ves. 51.

The COURT after hearing the affidavit, allowed the certificate (2).

1842.
Jan. 15. } *Ex parte* JACKSON re MOODY.

Practice.—Costs.

Where an assignee having paid a dividend in his own wrong, compels the proper party to petition the Court, he will be ordered to pay the costs personally, and not be permitted to retain them out of the estate.

This was the petition of the assignee of *Levi Robson*, an insolvent, who proved a debt under a fiat against *Moody* in 1839, and received one dividend before his own insolvency. A second dividend was declared in April 1840, and on the 27th of that month *Messrs. Peat and Hobson*, accountants of the bankrupt's estate, and one of whom had been appointed assignee, wrote to the petitioner to inform him, as *Robson's* assignee, of a dividend of 1s. 8d. in the pound, and that, on the joint order of the insolvent and his assignee, they would pay over the amount. Subsequently, however, the respondent or his clerk paid to the insolvent *Robson*, himself, the sum in question, without the proposed receipt. The petitioner applied for the dividend, but without effect, and no remedy was left except by these proceedings.

Mr. Rogers, for the petitioner.

Mr. Anderdon, for the respondent, contended, that there was no proof of a legal demand for payment; there certainly was a notice not to pay others, and the payment to the insolvent was a mistake, but there was no proof of a regular application by any one capable of giving a proper receipt.

SIR JOHN CROSS said, this was a petition to enforce payment of a sum of 7*l.*, which had been due two years, and the Court had sat for two hours listening to a proposition by the respondent, that the petitioner should pay the costs of affidavits which had little or nothing to do with the matter. The case was precise and simple, and he would look at its real merits. There was an insolvent who was a creditor under a bank-

(2) See *Ex parte Roberts*, Mont. & Ch. 653; s. c. 9 Law J. Rep. (N.S.) Bankr. 25.

ruptcy; and his assignee, under the Insolvent Debtors Act, came in as a petitioner. A correspondence took place in April 1840, relative to a claim for a dividend on a debt due to Robson's estate. The letters shewed, that the respondent knew, two years ago, that the debt had passed to the assignee. The dividend was paid to the insolvent himself by the respondent, in his own wrong. Six months afterwards, the solicitor to the petitioner wrote to demand payment, and said that he would present a petition if his demand were not complied with. Instead of sending an answer to the solicitor, an answer was given to the messenger who brought the letter, and who, of course, was unable to give a receipt. The solicitor, receiving no answer, waited another six months, and then presented this petition. He was then told by the respondent, that he never tendered a proper receipt; but this was not said in answer to the application by letter. The petitioner was placed under the necessity of presenting a petition, and the respondent must pay the debt and all the costs, and not, as assignee, take his costs out of the estate; because, after wrongfully paying the money to the insolvent, he had shuffled off payment to the rightful claimants ever since.

1842. } *Ex parte* MUDIE *re* JAMES.
Jan. 24. }

Practice.—*Petition to prove.*

The Court will not, in the absence of evidence, assume that a commissioner, in rejecting a proof, stated his reasons.

This was a petition to prove on a judgment debt for 500*l*.

Mr. Tyrrell, for the petitioner.

Mr. Green took a preliminary objection, that the petition did not state the grounds of the rejection of the proof by the commissioner, as was required by the Court, according to the decisions in the cases of *Ex parte Worth* (1), *Ex parte Wilson* (2), *Ex parte Wright* (3), *Ex parte Curtis* (4), and in

- (1) 2 Dea. & Ch. 4.
- (2) 1 Cox, 308.
- (3) 2 Ves. jun. 41.
- (4) 1 Rose, 274.

Schmaling's case (5). This was laid down as a fixed principle in the first volume of Messrs. Montagu and Ayrton's work on the *Practice in Bankruptcy*, p. 412, and he should ask to have the petition dismissed.

SIR J. CROSS.—I cannot assume that the commissioner did assign reasons; and if he did not, the petitioner has still a right to come and complain. If I find reasons alleged, and that they might have been stated on the petition, I will then consider how the petitioner ought to be dealt with. But I cannot, on that ground alone, dismiss a petition, in the absence of certain facts which may never have occurred.

1842. } *Ex parte* LEDICOTT *re* MILES
March 11. } GORDON.

Sale—*Fixing reserved Bidding.*

Case where the Court refused to allow the assignee to fix the reserved bidding.

Mr. Elwin applied for an order to allow the assignee of the bankrupt's estate, who was well acquainted with the value of the property about to be sold, to fix the reserved bidding instead of the commissioner.

Mr. Anderdon, for the assignee.

Per Curiam.—You have shewn no precedent for departing from the established practice.

Order refused.

1842. } *Ex parte* WYLDE *re* WYLDE.
May 11, 12. }

Act of Bankruptcy under 1 & 2 Vict. c. 110.

Where the wife of the creditor made the affidavit of the debt as due to herself and her husband, but the husband alone made the demand, and gave the notice, the provision of 1 & 2 Vict. c. 110. s. 8. was held to have been complied with.

This was a petition of Samuel Wylde, the bankrupt, praying that the fiat might be annulled. It appeared that the wife of Henry

(5) Buck. 93.

Hodson, the petitioning creditor, had lent a sum of money to the bankrupt, before her marriage. The alleged act of bankruptcy was the non-compliance with the provision of the 1 & 2 Vict. c. 110.

The affidavit was made by the petitioning creditor's wife, and stated the debt to be due to herself and husband, but the demand was made and the notice given by the husband alone; and on that account,—

Mr. Bacon, for the bankrupt, objected, that the provision of the statute had not been complied with.

Mr. Spence and *Mr. Smith*, contra.

SIR JOHN CROSS thought that the statute had been sufficiently complied with, and overruled the objection.

1842. } *Ex parte* HOWDEN *re*
May 12, 25, 28. } LITHERLAND.

Ship—Mortgage—Purchase by Adoption.

Parties who had advanced money on the security of a ship, which was transferred to them upon trusts for sale, which were not disclosed on the registry, were held to have become owners of such ship, by assuming the controul over it upon the bankruptcy of the transferrors.

The question in this case, upon which the decision ultimately turned, was, whether the petitioners had not by their conduct made themselves owners of a ship, which had been assigned to them under the following circumstances:—In 1838, John Heyes and the bankrupts, trading under the firm of Heyes, Litherland & Co., applied to the petitioners, Howden & Ainslie, to accept on their account two bills of exchange, for 1,300*l.*, on a security which, as appeared from the correspondence between the parties, was as follows—That the ship *John Heyes*, which belonged to Heyes, Litherland & Co., should be transferred to Howden & Ainslie, with power to sell it, if either of the bills should not be duly taken up; and it was agreed, that if the ship should be sent on a voyage, it must be one which Heyes, Litherland & Co. might name, and should meet the views of both parties, and that the petitioners should receive the freight, and after deduct-

ing all expenses, pay the balance to Heyes, Litherland & Co.; that Heyes, Litherland & Co. should pay to the petitioners any loss or deficiency which might accrue on such voyage, and that the petitioners should have a lien on the ship and freight, for any loss or claim to which, as registered owners of the ship, they might become liable.

The ship was accordingly, on the 25th of December 1838, transferred to Howden & Ainslie, and the transfer duly registered; but the trusts for sale were not disclosed, either in the transfer or the registry, as required by the 42nd section of the Registry Act, 3 & 4 Will. 4. c. 55.

The bills of exchange, dated the 24th of December 1838, one payable at four, and the other at six months, were accepted and paid by the petitioners, who also paid divers expenses on behalf of Heyes, Litherland & Co., in respect of the outfit of the ship.

In consequence of some difficulty in selling the ship, it was sent on a voyage to the Cape of Good Hope, in the month of March 1839. In the beginning of that year, Heyes, the bankrupt's partner, died in the West Indies; on the 10th of June 1839, the fiat was issued against Litherland, the bankrupt.

On the 13th of July 1839, Howden & Ainslie wrote a letter to Capt. Wetherell, who was in command of the ship, containing directions as to its management, from which the following are extracts:—"Independent of a reference to the register of the *John Heyes*, you are aware we are the sole owners of this ship, under your command, and beg to hand you our instructions to supersede those received and signed by Messrs. Heyes, Litherland & Co., who have become bankrupt, and are in the *Gazette*; and what we now write, you will understand, altogether supersedes any prior instructions you may have received from any quarter respecting the vessel. Our expectation is, that on your arrival at the Mauritius, which probably would be in July, the sugars were not shipped for Heyes & Co.'s account, but that you will have proceeded upon an intermediate trip, purposing to return to the Mauritius, where you will arrive some time in October or November. This intermediate freight belongs to us, as well as any other freights made *since you left the Cape*, and after disbursing the ship, remit through Messrs. Blythe Brothers & Co. or house where you

may be, to us, the balance. We are rejoiced to think, that you, whom we placed in the ship, are in command—one in whom we have confidence, and will act for our interests, as we are naturally very anxious, the ship having fallen into our hands, in consequence of Messrs. Heyes, Litherland & Co.'s failure, and we are interested in every respect for her success."

This letter was received by the captain in the month of February 1840, and he thenceforth acted under the orders of the petitioners alone. Several other letters of similar character were written by them to the captain, and a postscript to one, which was dated the 4th of January 1842, contained the following sentence:—"We find you have written Heyes, Litherland & Co. and R. Souter, letters about your freight and remittances. There is no occasion to inform people what you do,—mind this again."

It did not appear that the assignees interfered in any way with the management of the vessel, or that they had any distinct or specific notice of the conduct of the petitioners from themselves; but in April 1840, the bankrupt received a letter from the captain, dated Calcutta, 14th of February 1840, which commenced as follows:—"I was much surprised to find, on my arrival here, the change that had taken place since my departure from England, the *John Heyes* now being the property of Messrs. Howden & Ainslie."

In November 1841, Howden & Ainslie mortgaged the ship for 1,200*l.*, in order to pay the expenses of the voyage, which had fallen on them.

Mr. Wood, for the petitioners, contended, that they were entitled to a lien on the ship for the amount of the two bills of exchange, and the money paid by them on account of the outfit and expenses of the voyage, and to prove for any balance which might be due after the realization of their security.

Mr. Anderdon, for the assignees.—The petitioners are owners of the ship, and have, by taking the ship, paid themselves *pro tanto*. They appear on the register as owners, and they are precluded by the Registry Act (1) from setting up any title inconsistent with that which appears on the register; and independently of the provisions of that act,

(1) 3 & 4 Will. 4. c. 55. See ss. 31, 34, & 42.

they have made themselves owners. In their letters they so called themselves; and since the bankruptcy the vessel has been under their orders, and the captain their servant. The assignees disclaim all equitable interest in the vessel.

Mr. Wood, in reply.—The orders which Howden & Ainslie gave the captain, were consistent with the previous orders of the bankrupt; the vessel was sent by them on no new voyage. The captain was urged to come home as soon as possible. Howden & Ainslie were owners on the register, liable to any extent to which the captain might pledge their credit; they were, therefore, obliged to exercise some controul over the vessel, to protect their rights as mortgagees. They stood in the situation of mortgagees in possession, and may be considered like mortgagees of mines, and were entitled in that character to exercise acts of ownership over it.

[*SIR JOHN CROSS*.—Did not the assignees succeed to the position of the bankrupt?—did you give any intimation to them as to the state of the ship, requiring them to act?]

It was not necessary for the petitioners to do so; their instructions to the captain tallied with those of the bankrupt. He cited *Langton v. Horton* (2), before the Master of the Rolls.

May 28.—*SIR JOHN CROSS*.—In this case, the bankrupts contemplated a sale, and in the course of their negotiation with the petitioners, it was arranged that they should advance 2,600*l.*, and should have power to sell the ship and reimburse themselves. A complete legal title in the ship was conveyed to the petitioners; as between them and the bankrupt, they were owners of the ship, subject to an account of the proceeds.—[His Honour then detailed the facts as above stated, and, after adverting to the letter of the 13th of July 1839, proceeded as follows:]—This seems to be taking the entire dominion of the ship as their own property; as such, they dealt with it till the month of October, when the ship returned home. Under these circumstances, the petitioners must be considered as having taken upon themselves the ship, but upon what terms will they go to the commissioners to prove? The commissioners will say, You must first

(2) *Ante*, Chanc. 233.

give credit for the value of the ship you have taken to yourselves: that value is to be ascertained. When they took upon themselves the ownership, is a different question. In a letter to the captain, the petitioners stated themselves as owners from the time it left the Cape. Whatever expenses they incurred after that time, must be borne by themselves. The petitioners are, therefore, entitled to prove for the 2,600*l.*, subject to be reduced by the value of the ship when she left the Cape.

1842. }
May 30. } *Ex parte HARLING re SIMMONS.*

Partners—Second Fiat.

The 17th section of 6 Geo. 4. c. 16. does not apply where the partnership was dissolved before the first fiat issued; but where the accounts and estates are blended, the Court will direct the second fiat to be issued to the commissioners under the first fiat.

On the 17th of May 1842, a fiat was issued against James Simmons, John Simmons, and John Pine, co-partners, and who had formerly been partners with Benjamin Simmons, and under that fiat, the ballot for the commissioner had taken place, and an official assignee appointed.

On the 27th of the same month, a fiat was issued against Benjamin Simmons, and his then partner, John Brook, and the ballot for the commissioner had taken place.

The petition of Harling, who was the petitioning creditor under the last fiat, stated that the creditors of Simmons and Brook were interested in the estate to be administered under the first fiat, and that the accounts under the two fiats were much blended. Under these circumstances, which were verified by the affidavit of the solicitor to the two fiats, the petition prayed, that the second fiat might be transferred to the commissioner under the first fiat, and that it might be worked by the official assignee under the first fiat.

Mr. Anderdon, for the petitioner.

[*SIR JOHN CROSS.*—Is it not a matter of course where a fiat has been issued against one partner, and another afterwards issues against another partner, that such fiat should be directed to the same commissioner? His

Honour then read the 17th section of 6 Geo. 4. c. 16.]

That section applies where the partnership was subsisting at the time of the bankruptcy; here, the partnership determined long before the first fiat issued.

The COURT granted the prayer of the petition, except so far as it related to the transfer of the fiat, but refused to interfere with the commissioner, as to the appointment of the official assignee; and observed, that this was carrying out the intention of the legislature, as expressed in the 17th section of the Bankrupt Act.

1842. }
June 3. } *Ex parte HUFTON re WEST.*

Bankrupt Executor—Payment of Legatee.

Where an executor, who was also residuary legatee, had part of his testator's estate in his hands at the time of his bankruptcy, and a proof had been made in respect thereof, a legatee was held entitled to payment in full, out of the dividends.

This was the petition of John Turner and Hannah, his wife, and their two surviving sons, William West Turner and Cornelius Hufton Turner. It appeared from the petition, that by the will of Joseph Hufton, dated the 9th of October 1823, amongst other legacies, he gave 100*l.* to the petitioner, Hannah Turner, for her separate use, and gave the residue of his estate to Joseph West, the bankrupt, and directed that such residue should be divided by him amongst such of the testator's relations, and in such proportions, as he might think proper, without being subject to any account to such relations, and he appointed the bankrupt, with three others, his executors.

By a codicil, the testator revoked the bequest of 100*l.*, and directed his executors to pay the interest of 100*l.* to Hannah Turner during her life, and, after her decease, to pay the principal unto her three sons, the petitioners, and John Turner, (who died under age,) with benefit of survivorship, in the event of the death of any under twenty-one.

The will and codicil were, on the 4th of May 1829, proved by the bankrupt alone.

The petition stated, that the 100*l.* had not been invested: that no interest had been paid since the testator's death: that 39*l.* 16*s.* was due in respect thereof: that at the date of the fiat, the bankrupt had in his hands 402*l.* 14*s.* 7*d.* of the testator's personal estate, and that such sum had been proved by the bankrupt, as such executor, against his own estate, and that the dividends which had been declared on such proof, amounted to 156*l.* 1*s.* 4*d.*

The petition prayed, that out of such sum the interest might be paid to Hannah Turner, and that 100*l.* might be paid to William West Turner and Cornelius Hufton Turner, in equal shares, and that the residue of the 156*l.* 1*s.* 4*d.*, and all further dividends, might be paid into the bank, in the name of the accountant in bankruptcy, and invested in his name, to an account to be entitled "The residuary account of Joseph Hufton, deceased," and that the costs of the application might be paid out of the dividends.

Mr. Keene, for the petitioners.

Mr. Anderdon, for the assignees.

SIR JOHN CROSS.—If another person than the bankrupt had proved this debt, can it be doubted but that he would have been bound to pay this legacy of 100*l.*, before he handed over any portion to the bankrupt? The 156*l.* belonged to the testator's estate, and 100*l.* of it belonged to the petitioners.

*Order for payment of the 100*l.*,
without interest; no order as to
the costs.*

1842. } *Ex parte and re* THOMAS
June 4, 20. } NICHOLAS NEALE.

*Act of Bankruptcy under 1 & 2 Vict.
c. 110.—Commissioner's Powers—Bond.*

If the approval of the sureties in a bond tendered by a trader under the provisions of the 1 & 2 Vict. c. 110. s. 8, is obtained within the twenty-one days after the notice required by that act, he will not have committed an act of bankruptcy, by reason of a subsequent revocation of such allowance, on the ground, that it was improperly and fraudulently obtained, if such revocation is not made till after the twenty-one days.

A parol approval of the sureties is sufficient.

Semble—A commissioner may, before the twenty-second day after the notice, revoke his approval of the bond and sureties, if improperly obtained from him.

This was the petition of the above-named bankrupt, and it prayed that the fiat issued against him might be annulled, at the costs of the petitioning creditor. From the statements in the petition, it appeared that a copy of an affidavit made by William Henry Neale, the petitioning creditor, under the 1 & 2 Vict. c. 110. s. 8, was served on the bankrupt on the 3rd of May 1842, with the notice required by that act. On the 24th of that month, the bankrupt, with two sureties, entered into a bond for securing the debt, which was approved of by Mr. Commissioner Merivale, on the same day, and indorsed by him in the following manner:—"24th of May 1842,—Approved of by me, J. H. Merivale." On the same day, the bond was duly entered and registered, and delivered to the petitioning creditor. The fiat was issued on the 27th of the same month.

The grounds upon which the petition was opposed, as appeared from the affidavit of James Allberry, clerk to Mr. Patten, the bankrupt's solicitor, were as follows:—That at 5 o'clock in the afternoon of Monday the 23rd day of May, a notice was left at the office of James Patten, of the bankrupt's intention to attend before the commissioners in Basinghall Street, on the 24th and 25th days of May, with sureties to enter into a bond for the payment of the debt in question. Copies of the affidavits of the proposed sureties were annexed to such notice. The affidavit then proceeded to state, that at the time of the service of the notice, deponent told the person who served the same, that he could not accept it, as one of the proposed sureties resided in Essex, and that as James Patten only acted as agent in the matter, he had no time to communicate with his client, (F. W. Remnant, the solicitor of the said W. H. Neale,) who resided at Bilericay, in Essex, whereupon the person who served the said notice replied that he should leave the notice, and attend the said commissioner, according to the notice, on the 24th of May; and if the commissioner should

raise any objection as to the shortness of the notice, that the said parties would attend again on the following day at 11 o'clock, according to the said notice: that about 4 o'clock in the afternoon of the 24th day of May last, the bond executed and purporting to be approved by Mr. Commissioner Merivale, was left at the office of the said James Patten: that from the shortness of the notice, neither deponent nor the said James Patten had time for communicating with the said F. W. Remnant, in order to be prepared to attend to oppose the said sureties: that he, this deponent, and the said Mr. Remnant, and William Henry Neale, attended at the Court of Bankruptcy, at 11 o'clock on the 25th day of May, according to the notice, prepared with affidavits to oppose the sureties, having previously given notice to Mr. Edward Hodgkinson, the solicitor for the said bankrupt, that the said James Patten would attend on that day and hour, to oppose the said sureties, and apply to the said commissioner to vacate his approval of the bond, when the said Edward Hodgkinson attended, but, Mr. Commissioner Merivale not being in attendance, deponent on the same day served another notice at the office of the said Edward Hodgkinson, that the said James Patten would attend Mr. Commissioner Merivale, at the Court of Bankruptcy, on the 26th day of May, to oppose the said sureties, and also to apply to the said commissioner to vacate the said bond and the said commissioner's approval thereof: that on the 26th of May, he attended Mr. Commissioner Merivale, when the said W. B. Heath also attended on behalf of the said bankrupt, and Mr. Commissioner Merivale decided that his approval had been obtained by misrepresentation, and that the proposed sureties were insufficient, and on both grounds he disallowed the bond, and his approval thereof, which he accordingly cancelled, and the registry or entry of his approval was afterwards cancelled, and the bond so cancelled was afterwards returned to Edward Hodgkinson: that Mr. Commissioner Fonblanque, to whom the fiat, which was immediately issued, was allotted, was of opinion, that a valid and legal act of bankruptcy had been committed.

Mr. Bacon, for the petitioner.—The bond having been approved of, the requisition of the act of parliament was complied with,

and after the twenty-first day, the commissioner's power was at an end. If he had rescinded his approval before the twenty-first day, fresh sureties might have been obtained, but if the commissioners revoke their approval after the expiration of the time allowed by the act, it will be too late for the debtor to give fresh security, however solvent or capable of doing so he may be.

Mr. Anderdon and *Mr. Keene*, for the petitioning creditor.—The creditor who has an interest in the validity of the bond, is entitled to notice of the proceedings before the commissioner. The notice in this case was so short, that it cannot be considered sufficient. The bond having been cancelled, is a condemned instrument.

[*SIR JOHN CROSS*.—It is not cancelled; the approval only is cancelled. It is not necessary that it should be approved of in writing; the commissioner may give his approval by parol.]

The commissioner is exercising a judicial function, when he allows the security; his allowance, therefore, if obtained by fraud, is invalid, as the judgment of any other Court would be. This principle was recognized and established in *The Duchess of Kingston's case* (1).

[*SIR JOHN CROSS*.—But the allowance of the bond is not a judicial act.]

The debtor is bound to procure sufficient sureties, and if he puts forward persons as being sufficient, who are not so, he is guilty of fraud.

[*SIR JOHN CROSS*.—I disclaim all jurisdiction to try the solvency of the bail.]

The parties did not object to the commissioner going into the matter again, and they cannot now complain of what he then did.

SIR JOHN CROSS.—The question is, whether, on the twenty-second day, the petitioner had committed an act of bankruptcy. On that day the approval stood, and he was not therefore a bankrupt. But it is said, the commissioner had power to make him a bankrupt on any subsequent day. I shall pause before I give my opinion. In the meantime, the advertisement must be stayed.

June 20.—*SIR JOHN CROSS*.—The question in this case is, whether the petitioner has committed an act of bankruptcy within

(1) *Howell's State Trials*, v. 20, p. 538, n.

the act for abolishing arrest on mesne process. The 8th section enacts—[His Honour here read that section of the 1 & 2 Vict. c. 110.] It appears that the notice required by the act was served on the petitioner on the 3rd of May, and the 24th of that month was the day on which the debtor, if in default, became subject to a fiat in bankruptcy. On the previous day (the 23rd) he gave a bond with two sureties; the sureties were approved of by the commissioner, who indorsed the bond with his signature, and delivered it to the creditor's solicitor. On the following day, the creditor objected to the sureties, and on the 26th of May, the commissioner expressed his disapproval of the sureties, and cancelled his approval of the bond. The fiat was then issued, but it appears to me that the petitioner had not committed any act of bankruptcy on the twenty-second day (May 26th), having done all the law required, and the bond being then unimpeached. What happened subsequently, was of no consequence. The commissioner was *functus officio*, and incompetent to act, and after the twenty-second day he had no controul over the proceedings. Under these circumstances, the fiat must be annulled at the costs of the petitioning creditor; but, as it was issued in mistake, the petitioner must undertake not to bring any action.

1842. } *Ex parte* HAMBORG *re*
June 8. } HUDSON.

Servant's Wages — Seaman — Costs of working the Fiat.

A mate or other seaman is a servant within the 6 Geo. 4. c. 16. s. 48, and as such entitled to six months wages in full.

The servant of a bankrupt is not entitled to six months wages in priority to the payment of the costs of working the fiat.

The petitioner had been mate on board the barque *Orelia*, of which the bankrupt was both captain and one of the owners, and prayed, that 70*l.* 12*s.* 4*d.*, due to him for wages as such mate, might be paid out of a sum of 272*l.* in court.

It appeared from the petition, that the petitioner was mate of the vessel from the 8th of December 1828 till the 9th of December 1830, under different agreements as to

wages, when he was left by the bankrupt at the Swan River, in the service of other parties.

The fiat issued against the bankrupt in 1833, and in the course of that year the petitioner returned to England. During his absence, the vessel had been attached by the sailors, who returned with her to England, and it had been sold, and those seamen paid in full. The balance of the produce of the sale had been paid to the official assignee, by whose subsequent bankruptcy it had been lost to the estate. The petitioner proved his whole debt on the 21st of February 1834.

Mr. Charnock, for the petitioner, contended, that seamen's wages were within the 48th section of 6 Geo. 4. c. 16, and that he was, therefore, entitled to the payment of at least six months' wages.

Mr. Keene, for the assignees.—The wages are not due from the captain individually, for the petitioner is not his servant, but the servant of the owners of the vessel; the hiring by the bankrupt was only as captain of the vessel; the owners were liable for the wages.

[*SIR JOHN CROSS*.—By the petition, it appears that the bankrupt was both captain and owner.]

The mate was bound by an agreement in writing (1), and could not be considered a servant, within the meaning of the act. The petitioner was chief mate, and if anything had happened to the captain, he would have become master. If the assignees were to pay the amount claimed, the remainder of the fund in court would not be sufficient for the expenses of working the fiat.

SIR JOHN CROSS.—It seems to me, that the petitioner is a servant within the meaning of the act of parliament. I do not recollect a case of a seaman, but I see nothing to prevent him being considered a servant within the act; he is entitled to be paid six months' wages. The proof must be reduced accordingly. I shall, therefore, make an order accordingly; but the petitioner is not entitled to payment in priority to the charges of working the fiat.

Order made, with costs.

(1) How this was, did not appear from the papers.

1841. } *Ex parte* WOODGATE *re*
Dec. 8. } LITTLE.

Partners—Order and Disposition.

In the assignment of debts from an old firm to a new firm, where the debts were very numerous and small (as the accounts of tallymen), the Court held, that the doctrine of notice did not apply, to prevent the property assigned passing to the assignees, as in the order and disposition of the bankrupt.

This was a petition of the assignees of an old firm, claiming the outstanding debts of the old firm, on the ground, that there had been no actual assignment to the new firm, and no notice to the debtors, if there had been an assignment. The firm of Little & Chalmers were in the habit of sending out numerous travellers, called tallymen, whose occupation consisted in selling goods in small quantities to cottagers, giving the credit from time to time, and receiving payment by small instalments as they came round. At the time of the dissolution of partnership between Little and Chalmers, Little retired, and Chalmers agreed to pay him 2,650*l.*, by acceptance of the new firm, the outstanding debts to become the property of the new firm, which debts consisted chiefly of those small accounts created by the tallymen. The new firm became bankrupt first, and then a commission issued against the old firm.

Mr. Elmsley and Mr. Keene, for the petitioners, the assignees of the old firm, contended, that there had been no real assignment; and if there had, it was insufficient, as no notice to prevent the debts continuing in the order and disposition of the old firm had been given.

Mr. Bacon, *contra*, for the assignees of the new firm, contended, that the agreement entered into between the parties was a complete assignment of the outstanding debts; and that the doctrine of notice could never have been intended to apply to parties who possibly had never heard the names of any other party than the tallymen who came round.

SIR J. CROSS.—The right of proof is quite clear. The second question relates to order and disposition, and reputed ownership. 3,500*l.* debts passed by contract to the

new firm; and it is contended, that unless there was notice on the whole of the debts, they passed by order and disposition and reputed ownership. The only way to prove the case, is to fix on a single debt; but not one is claimed and identified as the property of the old firm, assigned to the new, and on which specific debt there was no notice. As to notice, the Norwich house employed hawkers to sell goods to people in humble stations, on payments of one-tenth every fortnight on circuit; and it is probable that these individuals never recognized any one but the man with whom they dealt, taking no more notice of the name attached to the heads of the bills or invoices than to the letters of the inscription on the coins which came into their pockets; and therefore there is no evidence to shew that the original firm ever had the reputation of being the owners of the debts. Perhaps, in some cases, there was notice—perhaps, few required it. There is no evidence of such a want of notice as would entitle the old firm to claim, and the petitioners have no case which can entitle them to do so. It is a singular case; one very proper to be brought forward; and the Court will, therefore, allow the costs of both parties out of the respective estates.

Petition dismissed.

1842. } *Ex parte* TURNER *re* TURNER.
Jan. 17. }

Official Assignee—Interest.

*The Court has power to charge an official assignee 20*l.* per cent. interest.*

This petition sought to charge James Clark, late official assignee, with 20*l.* per cent. interest on a sum of 200*l.*, which he had received under the bankruptcy of J. Turner.

Mr. Tyrrell, for the petitioners, relied upon the words of the 22nd section of 1 & 2 Will. 4. c. 56.

Mr. J. Russell, for the official assignee. —If the accounts in the bankruptcy are taken, there will be found due 210*l.* or upwards. This petition is unnecessary, and the attempt to impose a penalty of 20*l.* per cent. is oppressive, and certainly not a question for the Court of Review, but for

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the commissioner. In no case has either this Court or the Lord Chancellor interfered to enforce such a penalty. The Court will, therefore, dismiss the petition, and give a reference to the commissioner to audit the accounts, and see if there be anything due.

Mr. Tyrrell.—The commissioner has been applied to, and felt some difficulty, as the respondent has ceased to be an official assignee, and this application is made with his concurrence. As to the novelty of the application to this Court, occasions for these proceedings are fortunately very few.

SIR J. CROSS.—The receipt of the money is not denied, and that the respondent is bound to pay the same to the petitioners, who claim interest under the act. The Court has been addressed, on behalf of the defaulting assignee, but has no power to take such things into its consideration; and if once allowed, such favours would be invariably asked. It has been said, that the Court has no jurisdiction to order the payment of 20l. per cent., but that it is left to the commissioners. The act certainly declares the commissioners empowered to make a direction thereon; but it does not take away the authority of this Court; and I am of opinion, that there is nothing in this objection, and that this Court has full power to direct payment; and although it may never have been exercised by the Court, yet that is no reason why the Court should not exercise its legal functions when called upon.

Ordered, that the respondent pay the debt, with 20l. per cent. interest for one year, and the costs of the proceedings, within fifteen days.

1842. } *Ex parte* PARKER *re* STOCKS
March 3, 4. } AND SON.

Lunatic—Committee—Debts.

Semble—the committee of a lunatic has not power to vary or exchange debts, or alter contracts entered into by the lunatic, they being merely officers of the court.

This was the petition of Wm. Parker, as committee of Robert Parker, a lunatic, for leave to prove a debt of 15,525l. against the

joint estate of Samuel Stocks & Son. Robert and Thomas Parker carried on business in partnership as calico-printers at Heaton Mersey, until August 1826, when Mr. Stocks, sen. contracted for the purchase of the business. For a balance of 20,000l., due in respect of the purchase-money for the business, a warrant of attorney had been given, and this petition sought to prove the then unpaid balance against the joint estate of Stocks & Son. Thomas Parker died in 1828; and in October of the same year, a commission of lunacy issued against Robert Parker, under which the petitioner had been appointed committee; in May 1829, a grant of the estate in trust for the lunatic issued under the great seal; the partnership of Stocks & Son was formed in 1835, when the property was transferred without payment of any consideration by the son. During the four years that the partnership subsisted accounts were annually presented to the representatives, *i. e.* the committee of the lunatic. A fiat issued against Foster & Son in 1841, and the petitioner applied to prove for the balance due, but the commissioners held it to be due only from the separate estate of Samuel Stocks, sen., and not against the joint estate: this was an appeal against that decision.

Mr. Bacon and Mr. Clark, for the petitioners.—There is sufficient evidence of the adoption of the debt by the firm, as well as of its having been recognized by the petitioner. Without any special contract, there was such an assent between the parties, as brought them within the rule laid down in

Ex parte Jackson, 1 Ves. jun. 131.

Ex parte Clowes, 2 Bro. C.C. 595.

Ex parte Williams, Buck. 13.

Ex parte Whitmore, 3 Dea. 365; and

Ex parte Kedie, 2 Dea. & Chit. 321;

s. c. 1 Law J. Rep. (N.S.) Bankr. 87.

March 4.—*Mr. Bethell and Mr. Rol*, for the respondents.—The committees of a lunatic have ever been held unable to make any agreement varying the rights of a lunatic; they have ever been considered as the mere officers of the court, and have no power or authority to vary any contract or alter the rights of the party represented; they can neither make nor change a contract; they are mere bailiffs or receivers for the lunatic; and this proposition holds good, not only as

regards the committee, but is also true as regards the Great Seal itself (from whence the committee derive their authority), under the powers delegated by special grant from the Crown, *de prerogativo regis* in the reign of Edward II.

Mr. Bacon, in reply.—The terms of the grant are large enough to convey the power contended for; it contains the expression, for “use and governing debts,” &c., “and use and negotiation of the same, for the profit and advantage of the lunatic.” (*Shelford’s* treatise on Lunacy.) In this case the committee has acted merely for the benefit of the estate, in accepting the additional security of the son as well as of the father; and if any restriction were meant, it was only for the protection of the lunatic. Now this application has been directed by the Master’s report.

SIR J. CROSS.—In this case it appears that judgment was entered up in 1826 against the elder Stocks for 20,000*l.*, and there could be no question that for several years it was considered a separate debt. It is said, that four years before the bankruptcy, it became by partnership transactions the joint debt of Foster & Son. Had it really been the intention of the parties to have converted this debt into a joint debt, considering the magnitude of the transaction, it is likely there would have been a more regular mode of proceeding adopted; as it is, there was nothing amounting to a contract, and only one circumstance leading to such a construction, namely, the circumstances under which the son rendered the annual accounts to the lunatic’s estate respecting the debt and the rent of the buildings; these accounts were transmitted to the petitioner, who makes no objection to the form in which they were rendered, and that was all that existed to indicate a contract for the creation of a new debt. Such evidence is insufficient to prove what has been contended for by the petitioner; there appears no intention between the parties of converting the debt into a joint debt; the whole amounts merely to a mode of payment not affecting the relations of the parties. Without a contract there can be no right. As to the competency of the petitioner, as committee, it is unnecessary to say anything. I was not before aware, that the grant of

Edward II. delegated an authority to “negotiate debts,” which might raise a doubt; but that is not applicable in this case, as there is no proof of the conversion of the separate into a joint debt.

Petition dismissed, with costs against the petitioner.

1842. }
March 2, 7. } *Ex parte* PRICE *re* STEAD.

Equitable Mortgage—Fixtures—Order and Disposition.

Where property is mortgaged by deposit of deeds and memorandums, subsequently erected fixtures pass, unless evidence of an intention to except them, be shewn.

This was the petition of the registered officer of the York City and County Banking Company, for the sale of certain property, consisting of steam mills, near Borough-bridge, which had been equitably mortgaged to the company. There had also been a memorandum of deposit, which had been lost, stating, that the security was for any future advance, not exceeding the sum of 2,500*l.*; the security was given in 1836.

Mr. Bates, for the petitioner, contended, that he had a right to receive the benefit of the machinery then erected on the mortgaged premises, as well as those which had since been erected, such as some machinery for grinding bones and crushing seeds. It was unimportant when such machinery had been erected on the mortgaged premises; at least it had been held so in many cases, and this case was strengthened by an admission by the bankrupt, when seeking a further advance in 1840, that the security covered the whole of the property, which had been valued at 7,000*l.* In *Ex parte Nettlehip* (1), it was held, that the security was made to extend to the whole amount, by the conduct and admissions of the bankrupt: this case was precisely similar.

Mr. K. Parker, for the assignees.—The security was limited to the freehold only, and such machinery as was attached, and not removeable; the rest passed as by order

(1) 10 Law J. Rep. (N.S.) Bankr. 67.

and disposition, and could not be affected by the memorandum of deposit; neither could it have been intended that it should be. As to the allegation, that the bankrupt, in 1840, extended the security by his admission, there is an affidavit from the bankrupt denying any intention of extending the security. With respect to the steam-engine, bone grinding, and seed crushing implements, they were only held by bolts and screws, and not attached to the freehold; and the case of *Trappes v. Harter* (2) is decisive on that point.

Mr. Bates was not called on.

Cur. adv. vult.

March 7.—*SIR J. CROSS.*—The only question here is, whether the fixtures upon the mortgaged premises were included in the memorandum of deposit. No point has been taken as to the operation of the section, as to order and disposition, and the case must be looked at merely with reference to the contract between the parties. The authority of *Trappes v. Harter* has been much relied upon by the counsel of the respondents; but in that case the Court of Exchequer only decided that the security was not intended to cover fixtures. When this equitable mortgage was given, the bankrupt was owner of the fee as well as the fixtures and buildings. That fixtures existed there can be no doubt, and the memorandum was certainly intended to include them, as the words, "steam mills, cottages, land, buildings, and premises," were used. It remained therefore for the assignees to have shewn that the part they claim was excepted; but of that we have had no evidence. The assignees contend, that all the machinery was not erected at the time of the deposit; but that is of no consequence. I am of opinion, that there existed no intention to except anything at the time of the security being given. Therefore the petitioner is entitled to the relief prayed. The assignees will examine for themselves, whether any of the articles in question were not fixtures.

Ordered as prayed, costs of the mortgagee out of the security.

(2) 2 Cr. & M. 153; s. c. 3 Law J. Rep. (N.S.) Exch. 24.

1842. }
March 5. } *Ex parte BROADLEY re PILCHER.*

Proof, Expunging of—Contingent Liability.

The Court will entertain the application of a single creditor to expunge a proof.

Proof allowed on a contingent debt, although the contingency might never happen.

This was the petition of a creditor to expunge a proof for 1,068*l.*, allowed by the commissioner. The debt was dependent on a contingency, which might never happen, namely, default in the payment of an annuity.

Mr. Ellis, for the creditor, the petitioner.

Mr. Dixon, for the respondent, took a preliminary objection to the hearing of the petition, namely, that this was a petition by a single creditor to expunge a proof, whereas, by the 6 Geo. 4. c. 16. s. 60, it was requisite that such a petition should be by two or more creditors.

The COURT held, that the section did not apply. The commissioners had no jurisdiction before that act; but the present application was the same as to the Chancellor then, who would have entertained the question at the suit of a single applicant.

Mr. Ellis urged, that this was a proof on a bond for payment *in futuro* of 3,000*l.*, in the event of a certain contingency, a default in the payment of an annuity. The only clauses of the act at all bearing on the question, were the 54th and 56th, the one relating to annuity creditors, the other to contingent debts. This was clearly no debt, but merely a contingent liability, and, according to the cases of *Ex parte Marshall* (1), and *Ex parte Thompson* (2), not within the scope of the 56th section. As to the 54th section, the respondent was certainly not an annuity creditor, and therefore not within that section.

Mr. Dixon, for the creditor, opposed the application, and contended, that *Ex parte Marshall*, where the bankrupt had undertaken to indemnify, did not apply. This case was within repeated decisions of the Court.

[The COURT.—Have you any case where

(1) 1 Mont. & Ayr. 146; s. c. 3 Law J. Rep. (N.S.) Bankr. 37.

(2) 2 Dea. & Chit. 126; s. c. 2 Law J. Rep. (N.S.) Bankr. 6.

a contingent debt was allowed,³ when the contingency might never happen?]

Ex parte Grundy (3) and *Ex parte Vanheythusen* (4) seem decisive.

[The COURT had an impression that the proof could not be sustained; but on attention being called to *Vanheythusen's case*, felt unable to distinguish between them, and would read the authority before deciding.]

March 7.—The COURT found the case of *Vanheythusen* conclusive, and, the present being undistinguishable, directed the dismissal of the petition to expunge, with costs.

1842. }
April 19. } In re DANIEL BRITTEN.

Jurisdiction—Contempt.

The Court has no power to alter the place of custody of a person committed for contempt, from the Fleet to the Queen's Bench, or any other prison.

In this case, the party, Daniel Britten, was brought up in custody by an officer of the Queen's Bench prison, on a writ of detainer, operating as a writ of *habeas corpus*, granted some time since on the application of *Mr. Bacon*, on a complaint for contempt in non-payment of costs, and a prayer for committal to the custody of the warden of the Fleet.

The COURT directed his committal to the Fleet as prayed.

The bankrupt earnestly begged to be re-committed to the Queen's Bench, where, under a vesting order, he had filed a schedule, and taken other steps for his own relief before the Insolvent Court.

The COURT held, that it had not power to comply with his request. He had been brought up under the form required by law, and the Court had no authority beyond directing his committal to the Fleet Prison.

Notes.—The above proceedings are perfectly novel; no such writ ever having been previously issued, and much doubt existing as to the power of the Court therein.

(3) Mont. & M'Ar. 293.

(4) 1 Dea. 360; s. c. 5 Law J. Rep. (N.S.) Bankr. 19.

1842. }
April 16. } *Ex parte HAYNES re PINE.*

Practice.—Substitution of Debt.

Case, where the Court, under the circumstances, permitted the description of the petitioning creditor's debt to be altered after the fiat issued, by the addition of the name of another creditor.

This was a motion to have leave to amend a fiat, by issuing fresh docket papers, and varying the description of the debt on which the fiat issued. The petitioning creditor had carried on business in partnership with a gentleman named Evans, who on his retirement made an assignment of the debts. The debt on which the fiat issued was declared an equitable debt, but the commissioner advised the introduction of the name of the retired partner, in consequence of the debt having been created while the partnership subsisted. It was therefore proposed to describe it as the joint debt of two, instead of the separate debt of one.

Mr. Christie, for the motion.

The COURT allowed the substitution.

1841. }
Nov. 5. } *Ex parte COOPER AND OTHERS*
1842. } *re YOUNG.*
April 25. }

Property—Order and Disposition—Policy of Insurance.

Where policies of insurance or shares in a bank are assigned without notice, it will be necessary for the parties claiming them, as in the order and disposition of the bankrupt, to bring proof of reputation of ownership in the bankrupt.

This was the petition of the registered officer of the Kent and Sussex Joint Stock Banking Company, claiming to be considered equitable mortgagees of some policies of insurance, and other property deposited by the bankrupt, as a security for his balance with the banking company, and praying the usual order for an account, &c.

Mr. Bacon, for the petitioners, admitted

that a mere formal notice had not been served upon the insurance office, but which, he submitted, after the recent decision in *Ex parte Smith re Styan* (1), would not deprive his clients of their right to the policies in question.

[SIR J. CROSS.—I do not see any evidence of reputed ownership. I must say, as a judge of law and fact, that I cannot hold that property the beneficial interest in which he has assigned to another, shall be continued in his order and disposition, merely because he may have omitted to give a formal notice, which notice, in most cases, would not have been attended to if it had been given.]

Mr. Russell, for the assignees.—If the law stood as it did from 1827 down to 1840, the present petitioners must fail, as it was held, that a transfer of a policy of insurance without notice to the office, was ineffectual as against assignees in bankruptcy. It is true the Courts held very slight notice sufficient, as it had not been decided before 1827; but it was then argued before the Vice Chancellor, and solemnly settled, that notice to an office was requisite, to take such a chose in action out of the order and disposition of the bankrupt. The cases in which it was held, that notice to one partner operated as notice to another, do not apply to joint-stock companies.

[SIR J. CROSS.—To whom do you say the law requires that notice should be given? Suppose a person called at any office belonging to the company, and said so and so has assigned his policy to me, and went away, would that be good if no notice were taken of it? would that be effectual?]

Yes; the rule established is, that to make any policy transferable, there must be notice. It is then said, that the party assured was a partner, and had a share in the profits; but that does not apply to a case like the present, where the partners have no controul.

[SIR J. CROSS.—What notice do you contend for?]

That is no consequence here; there has not been any notice.

[SIR J. CROSS.—But here we have an act of parliament, which says, all property which was in his reputed ownership; whereas there

is no proof here of any reputation of ownership.]

When this was first agitated, it was urged, that the property in policies could not be known until the death of the insured, and that therefore no reputation of ownership could exist; yet, the Court held otherwise. But the effect of that decision is now endeavoured to be got rid of by the point contended for upon this petition.

[SIR J. CROSS referred to *Ex parte Moore* (2).]

The rule laid down by Lord Eldon in *Ex parte Ellis* (3) is, that the partner cannot prove until payment of the joint debts; now nothing can be more certain than that those persons were partners, and, if so, they are clearly excluded.

SIR J. CROSS.—In this case, Mr. Russell appears for the assignees, and sets up a case that these are joint creditors. No shadow of proof has been produced that there are any joint creditors, upon which all the former decisions have rested; but, as the judgment will require a little consideration, it had better stand over for a day or two.

April 25.—SIR J. CROSS.—The petitioners state themselves to be the trustees of the Sussex Joint Stock Banking Company, and claim a debt of 1,423*l.*, with leave to avail themselves of certain securities, and receive dividends as creditors for the remainder, the balance of a current account. This is objected to by the assignees, and one of the points having been the subject of an appeal in a similar case, this petition stood over to await the result. The petitioners represent a banking company, not constituted according to the provisions of the act passed under George the Fourth, nor incorporated. In this company the bankrupt held shares; and it was a rule or a bye-law, that the company should hold a lien upon all the shareholders' shares for any advances made by the banking company to the shareholders. The first objection taken by the assignees was, that the petitioners were partners, and not entitled to come in competition with other creditors: the answer to this was, that there was no competition, for that no joint creditors had proved: also, that the bankrupt had

(1) 2 Mont. D. & D. 219; s. c. 10 Law J. Rep. (n.s.) Bankr. 79; ante, Chanc. 127.

(2) 2 Glyn & Jam. 166.

(3) Ibid. 312.

carried on a distinct trade, he not only being a banker as a shareholder, but carrying on a separate establishment under the name of Young & Son, while he held the shares in his own name only. He was therefore carrying on a distinct trade. It also appeared, that there was no evidence of competition,—probably there was none. I am therefore of opinion, that the petitioners are entitled to come in as creditors under the fiat. As to the securities, the first was a real security, to which, if the petitioners were entitled as creditors, there could be no objection. The second was a lien on twenty shares of 10*l*. each in the banking company; to this it was objected, that the bankrupt was the reputed owner, and that the shares passed under the 77th section as being in his order and disposition; but of such reputed ownership the assignees offered no evidence, and the petitioners are entitled to retain them. As to the deposit of two policies of insurance, the same objection was urged, but no evidence of reputation of ownership tendered, counsel resting his claim on the ground, that the petitioners had not shewn any notice to the insurance office before the bankruptcy. It was contended, that this was conclusive, but I am of opinion, that the want of proof of notice is not sufficient; and also, that there is no proof of reputed ownership. The Court of Chancery has, since the hearing, affirmed the judgment of this Court In *Ex parte Smith re Styant*, relative to the assignment of a policy of insurance. I am therefore of opinion, that the petitioners are entitled to stand as creditors for the balance of the banking account, and to have the benefit of all their securities.

1842. }
April 20. } In re JAMES GARDNER.

Certificate, Signature of.

Case where the Court, under the circumstances, permitted a certificate to pass with the signature of two out of four commissioners.

Mr. Barlow applied, that a certificate of conformity might pass, which had only been signed by two out of the four commissioners named in the fiat, instead of a majority, as

required by the 6 Geo. 4. c. 16. s. 121. It happened that one of the four commissioners had died before signing the certificate, and the other commissioner had retired from the profession, and was residing at a distance, and in fact had never qualified or acted in the commission.

Per Curiam.—You may take an order, under the circumstances of this case; but you must take it for what it may be worth. The Court pronounces no opinion upon its legal validity, nor can it undertake to render any further assistance.

1842. }
April 22. } *Ex parte* G. AYLWIN, for J. AYLWIN, re FARRINGTON.

Lunatic—Proof—Choice of Assignees.

Case where the Court allowed the brother of a lunatic to prove, and vote in the choice of assignees.

Mr. Spurrier applied on behalf of the brother of a creditor of unsound mind, not in confinement in any asylum, but under the care of two keepers, for leave to prove a debt on his behalf, and vote in the choice of assignees. The condition of the creditor was attested by the certificate of three physicians.

The COURT could not look forward to the choice of assignees, but would give leave to prove the debt, leaving the rest to the discretion of the commissioners.

Mr. Spurrier pressed on the Court the importance of voting in the choice of assignees, in consequence of the debt being sufficiently large to controul the selection. He referred to the opinion of Sir T. Plumer in *Ex parte Maltby re Simmons* (1).

The COURT at first hesitated, but ultimately consented, on the authority of the case cited.

(1) 1 Rose, 387.

1842. }
May 31. } *Ex parte and re MAGNUS.*

Petitioning Creditor's Debt, Substitution of—Bill of Exchange.

Semble—*Where a bill of exchange given to a creditor in payment of a debt, is in the hands of an indorsee at the time of the act of bankruptcy and the issuing of the fiat, the creditor cannot support a fiat either upon the bill or the original debt.*

On the hearing of a bankrupt's petition to annul the fiat, on the ground of the insufficiency of the petitioning creditor's debt, the Court will permit it to stand over, to give an opportunity for substituting another debt.

This was the petition of the bankrupt, praying that the fiat might be annulled, on the ground, that there was no sufficient petitioning creditor's debt.

The fiat was issued on the 24th of March 1842, on the petition of Messrs. Rogers, who claimed a debt of 79*l.* and upwards, and of Messrs. Holtum, on a debt of 78*l.* The act of bankruptcy relied upon, was committed on the 21st of March 1842. One of the points raised was as to the amount of Messrs. Rogers's debt, which the petition alleged had been reduced by the payment of 10*l.*; but the principal question turned upon the debt of Messrs. Holtum. It appeared that the bankrupt, being indebted to them for goods sold and delivered, accepted a bill of exchange drawn on him by Messrs. Holtum for 63*l.* 15*s.* 10½*d.*, in part payment of their debt. The bill was dated the 6th of January 1842, and was payable three months after date. At the time of the act of bankruptcy, and the issuing of the fiat, the bill was in the hands of Messrs. Latham & Co., to whom it had been indorsed, and negotiated. It appeared from one of the affidavits, that on the 10th of February the bill was discounted for Messrs. Holtum by Latham & Co., who retained it till it became due. Under these circumstances,

Mr. K. S. Parker and Mr. Wright, for the bankrupt, contended, that inasmuch as Holtum & Co. were not holders of the bill at the time of the act of bankruptcy, of making the affidavit, or of the issuing of the

fiat, they were not then creditors of the bankrupt. They cited

Ex parte Douthat, 4 B. & Ald. 67.

Ex parte Botten, Mont. & Bl. 412.

Mr. Bacon, for Messrs. Rogers.

Mr. Anderdon, for Messrs. Holtum, contended, that inasmuch as the bankrupt was indebted to them prior to, and independently of the bill of exchange, the debt, for part of which it was given, was a subsisting debt at the date of the fiat, notwithstanding the bill had been previously indorsed away; and that the payment being postponed, by the bill of exchange for three months, made no difference — *Ex parte Patzeker* (1).

[*SIR JOHN CROSS*.—There is no doubt, but that, notwithstanding the bill was payable *in futuro*, Messrs. Holtum were still creditors; but the question is, whether the bill of exchange was in the hands of the petitioning creditor at the time of the act of bankruptcy.]

Mr. Wright (in the absence of *Mr. Parker*,) in reply.

SIR JOHN CROSS, (after referring to the debt of Messrs. Rogers, which he held to be unimpeached, proceeded)—With regard to Messrs. Holtum's debt, I own, if it had not been for the case of *Ex parte Botten*, I should have thought, that notwithstanding the bill was out of their hands at the time of the act of bankruptcy, they had a right to prove the debt for goods sold and delivered; but, from that case it appears, that where the bill has been negotiated at the time of the act of bankruptcy, the petitioning creditor's debt is insufficient. I shall take time to consider the case.

Cur. adv. vult.

No further judgment was given, but, on a subsequent day, his Honour recommended the substitution of another debt, which was free from doubt, and directed the case to stand over for that purpose (2).

(1) 2 Dea. 469; a. c. 3 Mont. & Ayr. 329.

(2) See *Ex parte Rowton*, 17 Ves. 426; a. c. 1 Rose, 15.

1842. }
Jan. 15. } DAVID *re* DAVID.

Practice.—Changing the Fiat.

Case where the Court directed a renewed fiat to a place more distant, on account of the greater facility of travelling between the places.

Mr. Anderdon applied on behalf of a creditor, to annul a former fiat, and issue a new one, which it was requested should be directed to commissioners at Welchpool, instead of Machynlleth. The bankrupt resided and carried on business at Llanidloes, distant twenty miles from Machynlleth, and twenty-seven from Welchpool; but in point of fact the latter was, at this period of the year, nearer than the former for all purposes, inasmuch as the nearest road passable at this season, between the two former places, was not less than thirty-two miles.

Order allowed.

1842. }
Jan. 29. } *Re* BURNIE.

Fiat—Supersedeas.

Where a fiat has been sued out by parties in favour of the bankrupt, the Court will, if all the requisites be not strictly complied with, give preference to the fiat sued out by another creditor.

This was the petition of a petitioning creditor, asking that a former order for a *supersedeas* might be rescinded, and the petitioner have liberty to prosecute the fiat originally issued. On January 3rd, a fiat was sued out by the petitioner; on the 17th, within fourteen days, it was opened before Mr. Commissioner Fonblanque, and the party declared a bankrupt; and on the 18th, the adjudication was published in the *Gazette*. On the morning of the 18th, Mr. Figg, the respondent, presented a petition, alleging that there had been no adjudication entered, and asking a new fiat for himself. An order thereon was made annulling the first, and allowing a second fiat. An objection was made to the opening of this second fiat, but it was overruled by Mr. Commis-

sioner Holroyd, who was acting for Mr. Fonblanque.

Mr. Bacon, for the petitioner.—There has been a race and sharp practice, and it will be for the Court to say, whether the first petitioning creditor ought to be ousted, because he had no opportunity of inserting the adjudication in the *Gazette* before the following day. In the case of *Ex parte Henderson* (1), which will be relied on by the other side, the case of *Ex parte Ellis* (2) was quoted; and in that case, where the adjudication on Saturday was too late for the *Gazette*, the fiat was held to be good against a fiat sued out on the Monday, and the *supersedeas* was quashed, and a writ of *procedendo* issued. In order to bring the present case within the authority of *Ex parte Henderson*, they must prove on the other side, that the solicitor did not know on the 18th of the adjudication on the previous day. After all, the adjudication was published in the *Gazette* before the order to supersede issued, and before the issue of the second fiat.

Mr. Wood, for the respondent.—The course taken by the respondent was to prevent himself from being defrauded of his rights by the friends of the bankrupt. He had a debt of 457*l.*, and having given notice under the new act for payment or security, the period of twenty-one days elapsed, and an act of bankruptcy was committed on the 16th of December, the service of the notice having been effected on the 24th of the previous month. He found a docket had been struck on the 13th by a friend of the bankrupt's: it remained a dead letter until the 29th. On that day he again searched the office with a view of getting rid of it, when he found that the same solicitor had, in the name of a new creditor, another friend, superseded his first, and obtained a second fiat, which was not filed until the 17th, the last day for opening. The act of Vict. c. 110, prohibits the issue of a fiat after the expiration of two months, and this was a contrivance by the other side to defeat respondent's act of bankruptcy and means of issuing a fiat thereon. The acts done were for the protection of the bankrupt, who expected remittances from India by the over-

(1) 2 Rose, 190.

(2) 7 Ves. 135.

land mail, when his friends would have come forward to offer a compromise. There was therefore no sharp practice; and the respondent was perfectly regular in law. In *Henderson's* case, Lord Eldon recognized the rights of second parties, on applying after the expiration of the term and finding no notice. So also in *Ex parte Westall* (3). In *Ex parte Freeman* (4), Lord Eldon required proof of a *bona fide* intention to prosecute a fiat. The Court will therefore refuse the application with costs.

[SIR JOHN CROSS (to *Mr. Bacon*).—How can you get over this? The practice requiring notice, none having been given, and your client in fault.]

Mr. Bacon rested on the equity of the case, against the strict rule of practice.

SIR JOHN CROSS.—From all the circumstances, there appears to have been a race between a *bona fide* creditor and one in collusion with the bankrupt. It appears, as stated by *Mr. Wood*, that the petitioning creditor to the last fiat caused an act of bankruptcy by filing his affidavit of debt; and the limit of two months was attempted to be evaded, and the rights of the respondent defeated, by the contrivances of the bankrupt's friends. Things must remain as they are; the second fiat must have the preference, and the petition be dismissed with costs.

1842. } *Ex parte HILL re CLIFTON.*
May 6.

Fiat, Annuling—Laches.

The Court will not annul a fiat, upon the petition of parties who have laid by until after final dividend and certificate.

This was a petition from a creditor seeking to annul a fiat, which had been issued against *Mr. Henry Clifton*, a proctor, at Worcester, which had been issued against him as a picture-dealer. It appeared, that a final dividend of 2s. 8d. in the pound had been paid, and that the bankrupt had obtained his certificate.

Mr. Anderdon and *Mr. Keene*, for the petitioner, would leave it to the counsel in

support of the fiat, to shew how a gentleman so circumstanced as the bankrupt was, could be a trader or picture-dealer, merely for having, without shop, gallery, or any establishment for the purpose of trade, bought or sold a few pictures, mere ornaments in his dwelling-house.

[SIR JOHN CROSS.—Why did you not apply sooner? Why wait until a final dividend of 2s. 8d. has been paid, and the certificate granted?]

Such a legal disability and abuse of the process of the Court, ought not to be cleared by a lapse of a few months. If the fiat be annulled, the dividend will go in payment of the creditors, *pro tanto*.

Mr. Hallett, for the bankrupt; and *Mr. Wood*, for the petitioning creditor and assignee, were not called upon.

SIR JOHN CROSS.—In this case, the Court has a discretionary power, and the facts of the case must be looked at. The proceedings were open, and well known to the petitioners, who lived in the same place, and appear to have acquiesced in the adjudication of the commissioners. All the bankrupt's effects have been confiscated, and the proceeds distributed. And the petitioners have been looking on, awaiting the final dividend, resolved, if large, to participate, and if small, to interpose. Had they come before the whole process had been consummated, their objection would have commanded attention; but having tacitly acquiesced in the proceedings, they are no longer entitled to interpose.

Petition dismissed, with costs.

1842. } *Ex parte HIGGINS re CATON.*
May 12.

Proof—Indemnity—Partners.

A party whom the bankrupt had agreed to indemnify against certain debts, to which they were jointly liable, is entitled to prove under the indemnity in respect of debts paid by him after the bankruptcy.

This was the petition of *William Higgins*, who, prior and up to the 21st of August 1840, had been in partnership with the

(3) 4 Dea. & Chit. 350.

(4) 1 Rose, 380; s. c. 1 Ves. & B. 34.

bankrupt. On the dissolution of the partnership, the bankrupt became the purchaser of the petitioner's share in the business, and agreed to indemnify him from all the debts due from the partnership. The petition prayed leave to prove for a debt composed, in part, of some of the partnership debts which the petitioner had been compelled to pay in consequence of the bankrupt's default. It appeared, that some of the debts had been paid by the petitioner after the bankruptcy, and on that account,—

Mr. Kenyon S. Parker, and *Mr. Mylne*, for the assignees, contended, that the proof must be limited to such debts only as had been paid at the time of the bankruptcy, inasmuch as no debt existed in respect of the others at that time.

Mr. Bacon and *Mr. Rolt*, for the petitioner, contended, that under the agreement for indemnity, he was entitled to prove for all the debts which he had paid, whether before or after the bankruptcy, and that the agreement for indemnity extended to all alike. They cited *Ex parte Carpenter* (1), *Parker v. Ramsbottom* (2).

SIR JOHN CROSS.—Upon the authority of these cases the petitioner is entitled to prove for the partnership debts which he has paid since the bankruptcy. The costs must come out of the estate.

1842. }
June 3. } *Ex parte MOORE re MOORE.*

Trust Property — Assumed Ownership over—Costs.

If a testator's goods are used by his executrix and her after-taken husband, as their own property, they will pass to the assignees of the latter, independently of the question of reputed ownership.

Semble—A bankrupt's wife, who petitions the Court, will not be subjected to costs.

This was the petition of Mary Anne Moore (the bankrupt's wife) and George St. John Keele, trustees and executors of Thomas Glover, and stated the will of

Thomas Glover, the former husband of Mary Anne Moore, dated the 24th of February 1828, whereby he gave the residue of his property to the petitioners and John Glover, in trust to convert the same with all possible speed into money, and to lay out the same in the purchase of an annuity for the lives of his wife and children, on government, freehold, or other good and sufficient security, at the sole direction of his trustees, and to stand possessed of such annuity, in trust, and to pay the same, as it became due, unto M. A. Glover, for the sole use and benefit of his said children, and appointed the trustees executors of his will, which was proved by the petitioners alone, on the 5th of January 1829. Part of the residuary estate consisted of household furniture, (the subject of the petition,) which was not sold, but retained by the testator's widow till her marriage with the bankrupt in 1836, when it was taken by her to his house. The fiat issued on the 3rd of January 1842, and the furniture having been taken possession of by the messenger as part of the bankrupt's estate, the petition prayed, that it might be retained by the petitioners, as trustees and executors of the testator.

Mr. Bacon, for the petitioners.—The taking of the goods to the bankrupt's residence, could not alter the right, because the possession is consistent with the trusts of the will. Those trusts entitle the trustees to sell at any time they may think fit, during the life of the testator's widow. The possession of trust property consistent with a deed or will, is not within the 72nd section of the 6 Geo. 4. c. 16.—*Ex parte Martin* (1). The bankrupt, by his marriage, acquired no beneficial interest in the furniture, and he was a trustee of it at the time of the bankruptcy.

[SIR JOHN CROSS.—Have you looked at the case of *Quick v. Staines* (2), where it was held, that after an executrix had married, and she and her husband had dealt with the testator's property as their own, it might be taken in execution?]

That was the case of an executrix; she had power to sell; but this is the case of a trustee.—The following cases were also cited in the argument:—

(1) Mont. & M'Ar. 1.

(2) 3 B. & C. 268; s. c. 3 Law J. Rep. K.B. 46.

(1) 2 Rose, 331; s. c. 19 Ves. 491.

(2) 1 Bos. & Pul. 293.

Ex parte Horwood, Mont. & M'Ar. 169;
s. c. Mont. 24.

Shaftesbury v. Russell, 1 B. & C. 666.
Mr. Randall, *contra*, was not called upon.

SIR JOHN CROSS.—In 1828, the first husband of the petitioner appointed her and another executors, and directed that the remainder of his property should go to them, in trust to convert into money, and invest the produce in the purchase of annuities. No step was taken to carry this trust into execution, but she took the property into her possession; she thereby made the goods her own, and thus committed a *devastavit*. Eight years after, she married the bankrupt, and then no schedule was made, but the property was carried into his house, and enjoyed by the husband and wife. The trust was never considered as having any existence till after the bankruptcy. Then what is this property, but that which the wife took to herself, and made her own? She did not get rid of her liability to the children, but the property ceased to be trust property, and became her own. There is nothing to distinguish this case from that I have referred to, which decides it on general principles, without reference to the 72nd section of the Bankrupt Act. I must therefore dismiss the petition (3).

Mr. Randall then applied for costs.

SIR JOHN CROSS.—The general rule is, that a bankrupt does not pay costs. This is the petition of his wife, and it is not to be supposed that she is in a better position than he is. I cannot therefore order her to pay costs.

1842. } *Ex parte* EDWARDS *re* WISE,
June 16. } BAKER, AND BENTALL.

Bill of Exchange—Short Bills—Bankers.

Short bills deposited with bankers, on opening an account with them, do not pass to their assignees, though the depositor indorsed the

(3) Vide *Gaskell v. Marshall*, 2 Moo. & Mal. 132, s. c. 5 Car. & Pay. 21, in which the case of *Quick v. Staines* was commented upon. See also *Ex parte Massey*, 2 Mont. & Ayr. 173, s. c. 4 Dea. & Chit. 405, *Ex parte Elliston*, 2 Mont. & Ayr. 365, s. c. 5 Law J. Rep. (N.S.) Bankr. 3, *Viner v. Cadell*, 3 Esp. 88, *Ex parte Ellis*, 1 Atk. 101.

bills to the bankers, to enable them to receive the proceeds, when due, and drew on account of such proceeds.

The question in this case was, whether the produce of certain bills of exchange, which had been deposited with the bankrupts by the petitioner, belonged to him or the assignees. The petition stated, that Charles Edwards, the petitioner, was the holder of two bills of exchange, dated the 24th of June 1841, drawn by him upon Mary Browne, one of such bills being for 600*l.*, payable seventy-seven days after date, and the other for 400*l.*, payable six months after date; and that the bills had been accepted payable at Williams, Deacon & Co., bankers, London: that the bankrupts carried on the business of bankers, in partnership, at Newton Abbott, Devonshire: that the petitioner, on the 28th of June 1841, opened an account with the bankrupts, and deposited with them the two bills of exchange, which the petitioner then indorsed: that when the petitioner so deposited the bills, he saw Nicholas Baker, who was managing partner at the bank, who consented to open an account with him, and to receive the bills, but refused to discount either of them; and it was thereupon agreed, between Nicholas Baker and the petitioner, that the bankrupts should receive the bills on the petitioner's account, and that the petitioner should be at liberty to draw upon the bank in the usual manner, and should be charged interest on all sums drawn by him, and that he should not draw beyond 400*l.* until the bill for 600*l.* was due and paid, and that the bank should not be required to discount either of the bills, and should make no charge in respect of any such discount. The petition also stated, that, on the same day, the petitioner drew a cheque on the bank for 40*l.*; and, on the 12th of July following, he drew another cheque for 65*l.*, for which he received 25*l.* cash, and a bill for 40*l.*, drawn by the bankrupts on Williams, Deacon & Co., payable fourteen days after date; and that the petitioner's account in the books of the bank, was in the following terms: (that is to say)

Charles Edwards.

1841.

June 28. To self, 40*l.* June 28. To bills, 1,000*l.*
July 12. To self, 65*l.*

The bankrupts stopped payment on the 16th of July 1841, and the fiat issued on the 20th of that month. It appeared, that on the 29th of June, the bankrupts sent the bills to one Thornton Bentall, in London, to whom they indorsed them, in order that he might get them discounted there; but, not being able to do so, Thornton Bentall, by the direction of the bankrupt Baker, sent them, on the 16th of July, to Sanders & Co., bankers, in Exeter, with a request that they should discount them. This, Sanders & Co. refused to do, but kept the bills, and received their amount from the acceptor, when they became due.

The bills were claimed by the petitioner, and also on behalf of the bankrupts' estate, and notices of such claims having been given to Sanders & Co. by the respective claimants, the petitioner filed a bill in Chancery on the 4th of August 1841, against Thornton Bentall, (the bankrupts' assignees not having been then appointed), and Sanders & Co., praying the delivery up of the bills, and offering to repay the 40*l.* and 25*l.*, and give up the bill for 40*l.*, which had been dishonoured. In this suit, the petitioner gave notice of a motion for an injunction, but an affidavit of Thornton Bentall having been filed in opposition, in which he claimed the bills, as *bond fide* indorsee for value, the motion was abandoned.

Assignees were subsequently appointed, and the amount of the bills received by Sanders & Co. The petitioner also stated, that an action had been brought against the petitioner by one Sowden, the holder of the bill for 40*l.*, which Williams, Deacon & Co. had dishonoured, and that he had been compelled, besides the amount of such bill, to pay the costs of protest and interest, and the costs of the action, amounting together to 6*l.* 16*s.* 6*d.*; and that he had paid to Thornton Bentall his costs in the Chancery suit, amounting to 78*l.* 16*s.* 2*d.* The prayer of the petition asked, that it might be declared that the petitioner was entitled to the two bills for 600*l.* and 400*l.*, or the proceeds thereof, after allowing the two sums of 40*l.* and 25*l.*, and to be repaid the sums of 6*l.* 16*s.* 6*d.* and 78*l.* 16*s.* 2*d.*, the costs of the Chancery suit, and of that application, and interest on the sums of 6*l.* 16*s.* 6*d.* and 78*l.* 16*s.* 2*d.* from the time when the

same were paid, and that the whole of the monies which the petitioners should be declared entitled to, remaining after applying the 1,000*l.*, might be paid out of the general assets of the bankrupts.

Mr. Bacon and Mr. Follett, for the petitioner.—Payment of bills into a bank, without any authority to negotiate them, does not vest them in the bankers, so as to make them pass to their assignees, in case they become bankrupt; and this is so, though the depositor draw upon them.

The indorsement of the bills is necessary, in order to enable the bankers to receive them when they become due; and in all the cases upon this subject it will be found, that the bills have been indorsed (1). They cited the following cases:—

Thompson v. Giles, 2 B. & C. 422; s. c. 2 Law J. Rep. K.B. 48.

Ex parte Armitstead, 2 Glyn & Jam. 371.

Ex parte Sargeant, 1 Rose, 153.

Jombart v. Woollett, 2 Myl. & Cr. 389; s. c. 6 Law J. Rep. (N.S.) Chanc. 211.

Ex parte Bond, 1 Mont. D. & D. 10; s. c. 9 Law J. Rep. (N.S.) Bankr. 18.

Mr. Anderdon and Mr. Keene, for the assignees.—In every case, including *Ex parte Bond*, there was a balance in the hands of the bankers at the time of the deposit. Here there was no balance, but a debit on the general account. The bills were indorsed for the purpose of enabling the bankers to deal with them as they might think fit; the opening an account implies a continued dealing; the deposit and indorsement of the bills was the foundation of the banking account, and the bankers would have been bound to answer any cheque to the amount of the bills. There is no authority which decides that where the cash balance was against the customer he is entitled to short bills.

Ex parte Thompson Mont. & M'Ar. 102.

Ex parte Robinson, Buck. 113.

Mr. Cameron, for Sanders & Co., submitted to the jurisdiction of the Court, and asked for the costs of their appearance, as well as those incurred by them in the Chancery suit.

(1) See *Ex parte Twogood*, 19 Ves. 229.

SIR JOHN CROSS.—The question in this case is, to whom did these bills belong at the time of the bankruptcy? The petitioner deposited his two bills with the bankers, to be held as a security for any sums which they might afterwards permit him to draw. There is an attempt to deny this, but Nicholas Baker admits that he refused to discount the bills. The bank was at this time insolvent. The bills were deposited in the bank as the property of the depositor, who never parted with such property. When the bankers negotiated the bills, they were guilty of a breach of trust. The bills were negotiated by Thornton Bentall as a *bond fide* party, and he had, therefore, a lien on them for his debt, but he has been paid. Sanders & Co. refused to discount the bills, but hold the money, and submit to dispose of it as this Court shall direct. Under these circumstances, the petitioner is entitled to receive 935*l.*, subject to the costs of Sanders & Co., in respect of these bills. The order must so declare, and direct Sanders & Co. to pay over the same.

The assignees who have resisted the claim, must pay the petitioner's costs, but they are entitled to the 65*l.*, after paying the costs of Sanders & Co., who must pay to the petitioner 935*l.*, after deducting their costs in the Chancery suit.

1842. *Ex parte* MAGNAY AND ROGERS, *Sheriffs of London,*
June 4, 29. *re* HENRY THOMAS AUSTIN,
HENRY MAUNDE, AND JAMES
TILSON.

Extent—Fund in Court—Crown Debtor—Accountant General—Costs.

Where a sum in court, to the credit of a bankrupt's estate, has been attached by the sheriff under an extent against the bankrupt, and the Court of Exchequer has ordered it to be transferred into that court, the Court of Review will not give effect to such order, except on a petition in which the question of the right of property can be determined.

If the Accountant General appears upon a petition, in which no relief is sought against him personally, he will not, under the general rule, be entitled to his costs, though served with a copy of the petition.

This was the petition of the sheriffs of London, and prayed that a sum of 7,057*l.* 15*s.* 8*d.*, then standing to the credit of the estate of the bankrupts in the books of the accountant of the Court of Bankruptcy, might be transferred to the Court of Exchequer.

By an order of the Exchequer, made 12th of June 1841, in a cause instituted on behalf of the Crown against the three bankrupts, a writ of *non omittas capias ad sa.* and extent, bearing date the 15th of March, 56 Geo. 3, issued to the sheriffs of the city of London against the bankrupts, debtors to the Crown in 22,743*l.* 8*s.* 10*d.* The writ was indorsed with a direction to levy 800*l.* 5*s.* 11*d.* and 1,146*l.* 6*s.* 4*d.* for costs, less by the sum of 119*l.* 18*s.* 10*d.* than received.

By an inquisition taken on the 2nd of November 1841 (which appeared to have been the second inquisition taken under the writ), it was found that the bankrupts were entitled to a sum of 7,057*l.* 15*s.* 8*d.* standing in the name of Basil Montagu, Esq., the accountant of the Court of Bankruptcy, in the books of the Bank of England, under a certain commission of bankruptcy then in force against them, and that the said Basil Montagu, as such accountant, held the same in trust for the bankrupts; and the sheriffs thereupon returned, that they had seized the same into the hands of the Queen, and notice of the return was given to Mr. Montagu and to George Gibson, the official assignee, for himself and the other assignees. On the 8th of November, the Exchequer ordered, that if no one should claim the money mentioned in the inquisition, on or before that day seven-night, the usual order for payment thereof should go. No person having claimed the money, the sheriffs were, on the 22nd of November, served with an order, made on the 18th of that month, commanding them on or before the 30th of November, out of such sum to pay to Edward Knight, Esq., the surviving surety to the Crown of the bankrupt Austin, and to Edward Knight and Mary Austin, the personal representatives of James Leigh Perrott, Esq., the other surety, the sums of 808*l.* 5*s.* 11*d.* and 1,026*l.* 7*s.* 6*d.*

The accountant general having refused to comply with the application of the petitioners for the money, they presented their

petition, praying that he might be directed, out of the sum of 7,057*l.* 15*s.* 8*d.*, to pay to them the amount of the two before-mentioned sums, together with their poundage and officers' fees. The commission against the bankrupts issued in March 1816. From the affidavit of George Gibson, the official assignee, it appeared, that 251*l.* 11*s.*, part of the sum in question, was received by him on account of the separate estate of the bankrupt Tilson, and that 7,057*l.* 15*s.* 8*d.*, the remainder of the sum, arose from the sale of certain interests of the bankrupt Maunde in an estate in the county of Worcester, to which he was entitled in reversion at the time he became debtor to the Crown. The sale took place after the interests came into possession, and William Laslett, the purchaser from the assignees, became so with full notice of the claim of the Crown, and without any covenant or indemnity against it. The affidavit stated, that on the occasion of such sale, the assignees were not called upon to shew, and they did not shew, and in fact they were unable to shew, that Henry Maunde ever had a good title to any part of, or interest in the estate in Worcestershire; and it submitted, whether the assignees did, in fact, sell any further or other interest in the said estate than such only (if any) as the assignees might then have therein, free from or after satisfaction of any incumbrance affecting the same, and whether any part of the sum of 7,057*l.* 15*s.* 8*d.* did, under the circumstances, at all represent any interest in the said estate in Worcestershire, which, under the writ of extent, would have been liable to be taken, seized, and applied in satisfaction of the claim in respect thereof. From the same affidavit it also appeared, that the bankrupt Maunde died in March 1816, and that his eldest son and heir had subsequently sold his father's interest in the estates to a Mr. Charles Bedford, without disclosing his father's bankruptcy, and that a suit, instituted by Mr. Bedford against the assignees and Laslett, for the purpose of setting aside the sale to the latter, as having been made fraudulently, and at an undervalue, was then pending, and that the 7,057*l.* 15*s.* 8*d.* was liable to the costs incurred by the assignees in such suit.

Mr. Anderdon and *Mr. Watson*, for the sheriffs, the petitioners.—The sheriffs were bound to return a seizure in law—*West on Extents*; and are entitled to the assistance of this Court in obeying the order made upon them by the Exchequer, in consequence of such return and the non-appearance of any one in that court to claim the fund.

[*SIR JOHN CROSS*.—Has this Court anything more to do than to see that it is *res judicata* in the Court of Exchequer, and give effect to the judgment of that Court?]

Mr. K. S. Parker and *Mr. Rogers*, for the assignees.—There is no jurisdiction in this Court to make the order. This is not the money of the bankrupt, but of his assignees, and cannot be taken under an execution against him.

[*SIR JOHN CROSS*.—I have no jurisdiction over the question of right of property; the only question before me is one of form. The sheriffs may take the money, and retain it till the Exchequer has decided the question of right.]

Mr. Charles Montagu appeared for the Accountant General of the court, who had been served with the petition, and asked for the costs of appearance.

SIR JOHN CROSS.—I must make the order asked for, but in order to give the assignees time to take measures for the protection of their rights, I will not order the money to be paid to the sheriffs till the end of a month, and the assignees may apply to this Court for a further extension of time if they shall find it necessary. With reference to the accountant general's application for costs; it is true, as a general rule, that a party served is entitled to the costs of appearing, but there is no rule without an exception; there was no necessity for him to appear, and I cannot give him his costs.

On the 29th of June, the petitioners obtained a further suspension of the order, to give them time to take the opinion of the Lord Chancellor on a special case, but it was afterwards arranged, that the petition should be reheard before his Honour Sir John Cross, and it accordingly came on again on the 11th of July, when it was re-argued by—

Mr. Anderdon, for the petitioners, on the same grounds as on the former hearing.

Mr. K. S. Parker and Mr. Rogers, for the assignees, were not called upon.

SIR JOHN CROSS.—This petition calls upon the Court to do a wholly unprecedented act. I am not prepared to do any such act, especially when I find that the order of this Court has been obtained upon misrepresentation, and I find that the title to 1,000*l.* and upwards has not been adjudicated upon. The last order was made without any discussion, but with a view to prevent the money from being distributed before the right was adjudicated upon, as I was most anxious not to do anything inconsistent with the order of the Exchequer. The respondents intimated an intention of appealing to the Lord Chancellor, but, instead of drawing up a special case, the petition has been reheard by consent. I have no authority to order the accountant general to pay over the money. A writ was issued by the Exchequer, directed to the sheriffs, commanding them to inquire what lands and goods the bankrupts had within their county. The inquisition found that the bankrupt was entitled to the sum of 7,057*l.* 15*s.* 8*d.* in the hands of the accountant general, and that the accountant general held it in trust for the bankrupts. The sheriffs having returned that the bankrupt was entitled to the money, and that they had seized it, the Court of Exchequer, of course, ordered it to be brought into court. It does not appear, that the sheriffs have made any attempt to get the parties to interplead: whether they could or not, I do not give an opinion. They have not shewn that they could not make a special return. Wright and Austin might have petitioned this Court to establish their rights, or the sheriffs, if compelled to pay, might in their names, or in their own, as it seems to me according to my present impression, enforce their rights by petition to this Court. But I cannot accede to the prayer of the present petition,—it must be dismissed, but without costs: the assignees may take their costs out of the estate (1).

(1) See *France v. Campbell*, 9 Dowl. P.C. 914.

1842. } *Ex parte FLETCHER re HUM-*
June 16. } *BERSTONE.*

Practice.—Amendment—Parties entitled to be heard.

An order for the substitution of a petitioning creditor's debt having been held to be defective in an action at law, the Court directed it to be amended, on the application of the plaintiff in that action.

A defendant to an action at law, who has not been served with the petition, cannot be heard in opposition to an application by the plaintiff for the amendment of an order of the Court, which had been held defective in such action.

This was an application to the Court for the alteration of an order made on the petition of the present petitioner for the prosecution of a fiat on his debt, instead of that of the original petitioning creditor, which had proved insufficient. That order was made on the 25th of May 1839, on a petition presented, on the 4th of that month, the substituted debt having been proved on the 1st of August 1837. In an action in the Court of Common Pleas, the validity of that order came into question; and it was held to be defective, because it did not shew that the substituted creditor had proved his debt before the petition for substitution was presented.

Mr. Bacon, for the petitioner, without discussing the validity of the original order, asked that it might be amended according to the decision of the Court of Common Pleas.

Mr. Deacon, amicus Curiae, referred to the case of *Ex parte Hall* (1).

Mr. Matcham, for the assignees, consented to the prayer.

Mr. Anderdon and Mr. Crompton applied to be heard in opposition, on behalf of *Molineux*, the defendant in the action, who had presented a cross petition, but—

The COURT refused to hear them.

SIR JOHN CROSS, after referring to the case of *Christie v. Unwin* (2), and observing that the present case went still further

(1) 1 Mont. D. & D. 217.

(2) 11 Ad. & El. 374; s. c. 9 Law J. Rep. (n.s.) Q.B. 47.

than that, for the order says,—“for the debt proved by them,” added—It is the duty of this Court to make an order which will be approved of in other courts; but I must observe, that the act of parliament which empowers this Court to direct a fiat to proceed on the substitution of another petitioning creditor's debt, does not provide that such direction should be made upon petition, or that any time should elapse between the application to the Court for the substitution, and the order directing it to be made.

Order as prayed (3).

1842. } *Ex parte* MOLINEUX *re* HUM-
June 16. } BERTSTONE.

Practice.—Order of Court—Amendment.

After the Court had amended an order for the substitution of another petitioning creditor's debt, to meet an objection which had been raised and held fatal, in an action at law, an application by the party in such action who had raised the objection, that the amendment might be made without prejudice to his action, was refused.

After the Court made the order in the last case,—

Mr. Anderson and Mr. Crompton, on behalf of the defendant in the action at law, who had presented a petition, praying that the order asked by Fletcher's petition, might not be made, or, if made, might be so without prejudice to his action, cited

Ex parte Watson, 3 Mont. & Ayr. 609.

Re Harper, 1 Mont. D. & D. 239.

Musketi v. Drummond, 10 B. & C. 161;
s. c. 8 Law J. Rep. K.B. 130.

SIR JOHN CROSS.—So long ago as the 25th of May 1839, the creditor who obtained the order for substitution, was entitled to that order. This Court was bound, *ex debito justitiæ*, to give him a good order. The officer of the court drew up the order in a manner which a court of law has held defective; the creditor comes back here and says, Give me the order which I was entitled to: the Court now gives him the order which

he was entitled to in 1839. Now a party comes and asks the Court not to do that which it has done: it is too late. The party then asks the Court to date the original order as of to-day. The petitioner was entitled to the order three years ago: then a party against whom an action is brought, now asks the Court that this clerical error may continue for his benefit. I cannot grant such a request; the petition must be dismissed (1).

1842. }
July 13. } *Ex parte* JOHNSON *re* JOHNSON.

Act of Bankruptcy—1 & 2 Vict. c. 110.

A trader cannot be made a bankrupt under 1 & 2 Vict. c. 110. s. 8, upon a debt for which an action could not be maintained.

This was a petition to annul a fiat which was issued against the petitioner, John Johnson, on the 26th day of March 1842. On the 1st of May 1841, the petitioner entered into a partnership with Joseph Horner the younger, for five years, as tow-spinners, which business they carried on at Leeds, under the firm of Johnson & Co.; Horner the younger also carried on the business of a corn-miller at Wakefield, in partnership with his father and brother, Joseph Horner the elder, and John Jubb Horner, under the firm of Horner & Co.

It appeared that Horner the younger, having made an ineffectual attempt to dissolve the partnership between himself and the petitioner Johnson, commenced a prosecution against him for forgery, for the purpose, as was alleged, of dissolving the partnership by that means; he then tried to make his partner a bankrupt, under the 8th section of the 1 & 2 Vict. c. 110, and Johnson & Co. being indebted to Horner & Co., an affidavit was made on the 26th of February 1842, by John Jubb Horner, that Johnson and Joseph Horner the younger were indebted to him, Joseph Horner the elder, and Joseph Horner the younger, co-partners in trade, in 700*l.* and upwards, for money lent. A copy of such affidavit, with the notice required by the act, was served both

(3) See next case.

(1) See *Re Humberstone*, *ante*, p. 15.

on Johnson and Horner the younger, on the 1st of March 1842; and at the same time Joseph Horner jun. gave notice in the newspapers to the creditors of Johnson & Co., not to pay any of their debts to the petitioner. The debt not having been paid or secured within the twenty-one days, a fiat was issued against Johnson alone, on the petition of one John Pollard and his partners, to whom Johnson & Co. were indebted in 1,000*l.*, for goods sold and delivered.

Mr. K. S. Parker and Mr. Pigott, for the petitioner.—The fiat was evidently taken out for the purpose of dissolving the partnership, and not for the proper objects of the bankrupt laws. If Johnson has committed an act of bankruptcy, so has Horner his partner, and a fiat would have been issued against them both, if the administration of their estate in bankruptcy had been the object of the parties. That a fiat will be annulled, if issued for the purpose of obtaining a dissolution of partnership, or any other improper object, has been repeatedly decided.

Ex parte Brown, 1 Rose, 151; s. c. (as

Ex parte Bourne,) 2 Glyn & Jam. 137.

Ex parte Christie, Mont. & Bl. 314, 319; s. c. 2 Dea. & Chit. 465, 488; 2 Law J. Rep. (N.S.) Bankr. 87.

Ex parte Hall, 2 Dea. 405; s. c. 8 Law J. Rep. (N.S.) Bankr. 5.

Ex parte Budd, 1 Mont. D. & D. 436; s. c. 10 Law J. Rep. (N.S.) Bankr. 17.

But there was no valid act of bankruptcy, for the debt of which the affidavit and demand was made, under the 1 & 2 Vict. c. 110, was not a legal debt upon which an action could have been sustained at law, for Horner, jun. was both debtor and creditor. The 8th section of the act evidently contemplates a legal debt only; if it were held otherwise, the debtor would be deprived of one of the three alternatives given him by the act. These alternatives are—first, payment; this his partner Horner, jun. had rendered impossible, by preventing the bankrupt from receiving any debts due to the firm, by the advertisement which he put in the papers.—Secondly, securing or compounding for the debt, to the satisfaction of the creditor: a creditor resolved to make his debtor a bankrupt, would of course refuse to accept any security or compensation.—Thirdly, giving a bond with two

sureties to pay such sum and costs as may be recovered in any action, or render himself to jail, which he could not do as to a debt upon which an action could not be maintained.

Mr. Anderdon and Mr. Stammers, for the petitioning creditor.—The intention of the legislature was, that the section of the act should apply to any debt. The firm who were creditors could maintain an action against that one of the debtors who was not a member of their firm, in case he did not plead in abatement.

[*SIR JOHN CROSS*.—You cannot say, that a debt is recoverable in law, the claim for which may be defeated at law, as in this case, by a plea in abatement.]

Supposing there was a good act of bankruptcy, then there was a good petitioning creditor's debt. The cases cited were instances in which one of the partners issued the fiat: here the petitioning creditors were not partners with the bankrupt—*Ex parte Wilbeam* (1). In *Re Parker*, decided by this Court in December 1839, and since affirmed by the Lord Chancellor (2), it was held, that a third party may avail himself of an act of bankruptcy, under the 1 & 2 Vict. c. 110.

SIR JOHN CROSS.—This is the petition of the bankrupt, praying to annul the fiat. The petition is supported on two grounds: first, that there was no act of bankruptcy; and, secondly, that the fiat was sued out for the purpose of obtaining a dissolution of a partnership subsisting between the petitioner and Joseph Horner the younger. There is a great deal of contradictory evidence; but let us see what the undisputed facts of the case are. The bankrupt was in partnership with Joseph Horner the younger, and he (Horner, jun.) was also in partnership with his father and brother. Horner, jun. and the bankrupt contracted a debt with the three; and it is contended, that Horner jun. and his two partners could proceed for that debt, under the 8th section of the 1 & 2 Vict. c. 110, on the ground, that it need not be a legal debt. I think the observations of Mr. Pigott are correct: and that as this is not a debt recoverable at law, as no judgment could be obtained if the party pleaded

(1) 5 Mad. 1; s. c. Buck. 459.

(2) 9 Law J. Rep. (N.S.) Chanc. 103.

in abatement, it is not within the act. I do not rely exclusively on the insufficiency of the debt, upon which the act of bankruptcy was attempted to be established; I refer to the object for which the fiat was issued. But it is said, that unless the fiat was issued solely for the purpose of dissolving the partnership, it cannot be annulled. Now, if that were the case, no fiat could ever be annulled on this ground.—His Honour, after commenting on the evidence, concluded—I am of opinion, that the petitioning creditors obtained the fiat with the object of dissolving the partnership, and that there was no valid act of bankruptcy. The order must, therefore, be as prayed.

1842.
July 22, 30.

Ex parte BROWN AND
OTHERS, ASSIGNEES OF
JOHN AND WILLIAM CAM-
PION, *re* ROBERT AND JOHN
CAMPION, AND *re* JOHN AND
WILLIAM CAMPION.

Principal and Surety—Set-off—Cross Proof.

A. & B, country bankers, being indebted to W. & Co., their London correspondents, induced B. & C, who were partners in trade, to secure their debt, by giving separate promissory notes, and accepting a bill drawn on them by A. & B. B. & C. alone had overdrawn their accounts with A. & B. In this state of things, the two firms became bankrupt. W. & Co. proved against the separate estates of B. & C, on the notes of hand for part of their debt, and against their joint estate on the bill of exchange, for the remainder of the debt. They also proved against the separate estate of A, on a note of hand he had given for the whole debt. The assignees of A. & B. (under an order of the Court) proved against B. & C, for a debt of a larger amount than W. & Co.'s proof; and they also proved against C. for a debt of a smaller amount:—Held, that neither the estates of B. & C, nor of C. alone, were entitled to reduce the proof of A. & B. against them, or to a cross proof in respect of the dividends paid to W. & Co.

Where a surety is indebted to the principal, and both become bankrupt, and the creditor proves against the surety, and receives dividends from his estate, such dividends cannot

be made the subject of a cross-proof or set-off as against the debt of the surety to the principal, unless, semble, the creditor receives his whole debt from the surety's estate (1).

The bankrupts, Robert and John Campion, were bankers, in partnership, at Whitby. John Campion also carried on the business of a ship-builder, in partnership with William Campion. Williams, Deacon, & Co., bankers, of London, who were the correspondents of the Whitby Bank, applied to them in April 1841, for a security for the balance then due and to become due from them, whereupon the Whitby banking firm applied to William Campion, one of the ship-building firm, to join in certain notes of hand and a bill of exchange, which he consented to do; and the three following promissory notes, dated the 24th of April 1841, payable on demand to Williams, Deacon, & Co., were accordingly given to them, namely, a promissory note of Robert Campion for 10,000*l.*; a promissory note of John Campion for 5,000*l.*; and a promissory note of William Campion for 5,000*l.* A bill of exchange, dated the same day, drawn by the firm of Robert and John Campion, upon and accepted by the firm of John and William Campion, for 7,000*l.*, payable to the order of Robert and John Campion, on demand, was by them specially indorsed to Williams, Deacon, & Co. On the 19th of May 1841, a fiat was issued against John and William Campion, under which, William Brown, Henry Simpson, and Barker W. Barker, the petitioners, were appointed assignees. On the 22nd of the same month, a fiat was issued against Robert and John Campion, under which, the petitioners, Brown and Barker, together with William Addison, were appointed assignees. The balance due from the banking firm, at the date of their fiat to Williams, Deacon, & Co., amounted to 5,458*l.* At the date of these fiats, John and William Campion had overdrawn their account with the banking firm, to the amount of 9,433*l.* 19*s.* On the 27th of April 1842, the assignees of the

(1) This rule, if carried out, might lead to great injustice in some instances. Suppose the surety had guaranteed 1,000*l.*, and owed the principal creditor a debt of the same amount, and his estate paid 1*s.* in the pound, it would be charged with 1,500*l.*, being 500*l.* more than it ought to pay. Several similar cases might easily be put.

banking firm petitioned this Court for leave to prove against John and William Campion for that debt. At a dividend meeting, held on the 17th of last May, and before that petition was heard, Williams, Deacon, & Co. proved against the separate estate of John Campion, for 5,000*l.*, on his promissory note, and against the separate estate of William Campion, for 5,000*l.*, on his promissory note, and they proved against the joint estate of John and William Campion for 458*l.* upon the bill of exchange for 7,000*l.*, accepted by them. They also proved against the separate estate of Robert Campion, for 5,458*l.*, on his promissory note for 10,000*l.*

The petition then stated, that previously to the holding of the meeting, and with a view to the presentation of the petition, a claim had been made and entered on behalf of the estate of Robert and John Campion against the estate of John and William Campion, for 9,433*l.* 19*s.*, as the balance of account between the two firms, and on the occasion of the proofs by Williams, Deacon, & Co., the commissioners under the fiat against John and William Campion, caused the following memorandum to be made and filed with the proceedings:—

“Whitby, 17th of May 1842.

Re John and William Campion.

Admit proof by Williams, Deacon, & Co. against John Campion's private estate on his promissory note	5,000	£.
The same against William Campion on his promissory note	5,000	
Admit proof against John and William Campion's joint estate for 458 <i>l.</i> , part of their acceptance of 7,000 <i>l.</i> , being, with the other proofs, the total debt of Williams & Co., viz. 5,458 <i>l.</i>	458	£. s. d.

<i>Mem.</i> —That the claims of Robert and John Campion against John and William Campion for	9,433	19	0
Be reduced by	5,458	0	0

And the proof of the assignees of Robert and John Campion to be for 3,975 19 0

“*Query.*—As to the claim by the separate estates of John and William Campion, upon the joint estate of John and William Campion, for 5,000*l.*, elected by Williams & Co., to be taken out of the separate estate, being part of 9,433*l.* 19*s.*, the real debt of John and William Campion to Robert and John Campion.

“*Mem.*—Supposed that the joint estate will be liable for any surplus.”

The petition further stated, that in consequence of the last-mentioned proceedings,

the petitioner Simpson, on the 28th of May 1842, made an affidavit in opposition to the petition of the petitioners Brown, Barker and Addison, and thereby submitted to the Court, whether the debt of 9,433*l.* 19*s.* should not be reduced by 5,458*l.*, proved by Williams, Deacon, & Co. against the respective separate and joint estates of John and William Campion. That the petition came on to be heard on the 3rd of June last, and it then appearing to the Court that the claims of any parties representing or interested in the joint and separate estates of John and William Campion, against the estate of Robert and John Campion, in respect of the proofs by Williams, Deacon, & Co., could not be conveniently entered into on the hearing of that petition, but ought to be made the subject of an independent application, the Court ordered that the assignees of Robert and John Campion should be at liberty to prove against the estate of John and William Campion, for 9,433*l.* 19*s.*, and that the payment of any dividends on such proof should be suspended till after the 11th of July then instant, which time was fixed for the purpose of enabling the Court to deal therewith, in the event of any application being made to it in respect thereof. That a dividend had been declared upon the joint estate of John and William Campion, after the rate of 1*s.* 6*d.* in the pound; upon the separate estate of John Campion, after the rate of 2*s.* 4*d.* in the pound; and upon the separate estate of William Campion, after the rate of 3*s.* in the pound; and the sums then payable to Williams, Deacon, & Co. from such estates upon their proofs, were as follows, (that is to say,) from the joint estate of John and William 37*l.* 4*s.*, from the separate estate of John 583*l.* 6*s.* 8*d.*, and from the separate estate of William 750*l.*, and that no dividend had been paid on the separate estate of Robert. The petition then submitted, that the estate of Robert and John had been exonerated, and that relief ought to be afforded either by the reduction of the proof which had been admitted on behalf of that estate upon the estate of John and William, or by the admission of a cross-proof upon the estate of Robert and John, in favour of the estate of John and William. It also submitted, that proofs ought to be admitted upon the joint estate of Robert and John, in favour of the

separate estates of John and William, for the dividends then payable, or which should thereafter become payable, out of such separate estates, to Williams, Deacon, & Co., in respect of the debts of Robert and John Campion. It also submitted, that a proof which had been admitted against the separate estate of William in favour of the estate of Robert and John, for 493*l.* 8*s.* 4*d.*, ought to be expunged, and the amount thereof set off against the amount sought to be proved on behalf of the estate of William against the joint estate of Robert and John.

The petition prayed, that the petitioner's proof on behalf of the estate of Robert and John against the estate of John and William, for 9,433*l.* 19*s.*, might be reduced by 458*l.*, or otherwise that the petitioners, as assignees of the estate and effects of John and William Campion, might be at liberty to prove against the estate of Robert and John Campion for that sum. And that it might be declared that the petitioners, as representing the separate estates of John and William, were entitled to prove against the joint estate of Robert and John, for the amount of the dividends which had been or should thereafter be paid out of such separate estates to Williams, Deacon, & Co., upon the promissory notes given to them by John and William, and to receive the debt of the firm of Robert and John Campion. And that the petitioners might accordingly be at liberty, on behalf of the separate estate of John Campion, to prove immediately against the joint estate of Robert and John Campion, for 583*l.* 6*s.* 8*d.*, then payable to Williams, Deacon, & Co., out of such separate estate, and on behalf of the separate estate of William, to prove against the same joint estate, either for the whole of the 750*l.*, then payable to Williams, Deacon, & Co., out of such last-mentioned separate estate, or for the residue of that sum, after deducting thereout 493*l.* 8*s.* 4*d.*, in respect of the proof made against the estate of William, on behalf of the estate of Robert and John; and in case a proof should be admitted on behalf of the estate of William, for the residue only of the dividend paid out of that estate to Williams, Deacon, & Co., after deducting 493*l.* 8*s.* 4*d.*, then that the proof admitted against the estate of William, for the last-mentioned sum might be expunged. And that the petitioners might be at liberty

thereafter to prove from time to time against the estate of Robert and John, on behalf of the separate estates of John and William, for the amount of the dividends that might be thereafter paid out of such estates respectively to Williams, Deacon, & Co., in respect of the said promissory notes, as and when such dividends shall from time to time be paid.

Mr. Anderdon.—As William Campion was a surety for the debt, which the Whitby Bank owed to the London bankers, and that debt has been proved against his estate, the petitioners, as his assignees, are entitled to stand in the situation of the London bankers, and, to the extent that the proof of the London bankers against his estate has exonerated the estate of the principal debtors, to be reimbursed or indemnified out of their estate. The proof of the London bankers against the estate of William, has exonerated the estate of the principal debtors, if not to the extent of such proof, at least to the extent of the dividends paid thereon. Though proof may not be equivalent to payment, as against any parties liable, who are still solvent, it must be equivalent to payment, where all parties liable are bankrupt, for then there is no other mode of working out payment but by proof. The admission of a proof by one bankrupt firm against another, one of the bankrupts being a partner in each, lets in all the equities between them.

Mr. Bacon and Mr. Thomas Turner.—The petitioners cannot claim as sureties, unless they have paid the debt on behalf of their principal; proof is not equivalent to payment for this purpose.

[*SIR JOHN CROSS.*—In any of the cases upon this question, were the sureties debtors to the principal? Suppose there was no bankruptcy, and the Whitby bankers called upon the ship-builders for the debt, they would say, "No, we have guaranteed a debt to the London bankers—relieve us from that before we pay you."]

That principle cannot be applied in bankruptcy. The ship-building firm had paid nothing to Williams & Co. Accepting a bill for another does not create the relation of debtor and creditor. In bankruptcy, no debt is in general proveable but what is due at the time of the bankruptcy. A surety cannot prove against the principal, unless he

has fully discharged the liability—*Ex parte Rawson* (2).

Mr. Anderton, in his reply, confined his case to the prayer, that a proof for 750*l.*, and any other dividends which might be paid to Williams, Deacon & Co. from William Campion's estate, might be proved against the estate of Robert and John; and urged, that as the London bankers had proved against the estate of William alone and John alone, they could not now prove against the estate of Robert and John.

Cur. adv. vult.

July 30.—*SIR JOHN CROSS.*—In this case there were two partnerships between three brothers. Robert and John Campion were bankers, and John and William Campion were ship-builders. John was a partner in both firms. The banking firm has proved against the ship-building firm, for 9,433*l.* 19*s.* Messrs. Williams, Deacon & Co., the London bankers, the correspondents of the Whitby Bank, have proved for 5,000*l.*, against the separate estates of each of the ship-builders, who had guaranteed a debt due to them from the Whitby Bank. The separate estates have paid dividends on these proofs, on that of John, amounting to 583*l.* 6*s.* 8*d.*, on that of William to 750*l.* The petitioners claim, first, to reduce the proof made on behalf of the banking firm, by the amount of proof made by the London bankers against their estates. There was no ground upon which to support that claim, and it was given up, because the 9,433*l.* 19*s.* is a joint debt of the two, and the 5,000*l.* is a separate debt of each, therefore there could not be any set-off between them. At last the claim of the petitioners was reduced to a claim for 256*l.* 11*s.* 8*d.* (3), and that is the foundation of all the rights insisted upon. It is insisted, that the dividends paid by Williams's estate, having *pro tanto*

exonerated the Whitby Bank, are an exoneration of the bankrupts' estate; but there has been no exoneration; and there is, therefore, no foundation for the claim set up. The petition must be dismissed; but I shall make no order as to the costs.

1842. { *Ex parte* ROGERS *re* MAGNUS.
July 23, 29. { *Ex parte* MAGNUS *re* MAGNUS.

*Petitioning Creditor's Debt, Substitution of
—Costs of Bankrupt—Solicitor's Lien.*

Where part of the debt upon which the fiat was issued, turns out to be not owing to the petitioning creditor, other creditors, whose debts were incurred not anterior to such part, may unite with him in petitioning for an order that the fiat may proceed.

Quære—Does the 18th sect. of 6 Geo. 4. c. 16. authorizing the Court to direct a fiat to proceed, apply where the alleged debt of the petitioning creditor had no existence?

Though the Court will not give costs to an uncertificated bankrupt successfully petitioning under his fiat, it will provide for the satisfaction of his solicitor's bill of costs, if he has not been paid or indemnified from other quarters.

In the month of May last, the bankrupt petitioned the Court, that the fiat issued against him might be annulled on the ground of the insufficiency of the petitioning creditor's debt. On referring to the report of the proceedings on that petition, contained in a previous page (1), it will be seen that the fiat had issued on two debts, but that the bankrupt had successfully impeached one of them, namely, that of Messrs. Holtum, for 76*l.* 10*s.* 3*d.* by shewing, that on the 6th day of January last they had received a bill for 63*l.* 15*s.* 10½*d.*, part of it, which, at the date of the fiat, was not in their possession, but in that of an indorsee for value. The Court, on that occasion, directed the petition to stand over, to give some other creditors an opportunity of applying, for the prosecution of the fiat under the 18th section of the Bankrupt Act; and George Samuel Rogers, and several other of the creditors, who had proved un-

(2) *Jac.* 274.

(3) This sum added to the debt of 493*l.* 8*s.* 4*d.*, which William Campion owed the firm of Robert and John, makes up 750*l.*, the amount of the dividends paid on his estate to Williams, Deacon & Co. It appears to have escaped His Honour's notice, that 458*l.* had been proved by Williams, Deacon & Co. against the joint estate of John and William, upon the bill of exchange for 7,000*l.* It would seem, that if that debt had been paid by them, or wholly discharged by a payment of part, relief might have been obtained under the 52nd section of the Bankrupt Act.

(1) See *ante*, p. 32.

der the fiat (and whose debts, with the remainder of Holtum's debt and the unimpeached debt of the other original petitioning creditor, amounted to 200*l.*), presented their petition accordingly, and it now came on for hearing; and the suspended petition of the bankrupt was also put in the paper, to be finally disposed of at the same time. The petition of Rogers and the other creditors, his co-petitioners, prayed that their debts might be substituted for the debt of 63*l.* 15*s.* 10½*d.* of the Holtums, which had been found insufficient.

The petition stated, that John Sykes and William King, two of the petitioners, had proved a debt of 59*l.* 14*s.* 2*d.*, of which 36*l.* 6*s.* 11*d.* became due not anterior to the 6th of January 1842, and that the debts of the other petitioners were incurred not anterior to that day.

From the evidence read on the part of the bankrupt, it appeared, that the debt of Holtum consisted in part of a bill for 63*l.* 15*s.* 10½*d.*, given on the 6th of January for a debt then due, and partly of a sum of 12*l.* and upwards, incurred in the month of March last.

Mr. Anderdon and *Mr. Bacon*, for the petitioners.

Mr. K. S. Parker and *Mr. Wright*, for the bankrupts.—The fiat was originally issued on the assumption that Holtum & Co., were creditors to the amount of 76*l.* and upwards, but it turns out that, as to 63*l.* 15*s.* 10½*d.*, they were not creditors at all, inasmuch as they had received a bill for that amount, and had indorsed it away before the act of bankruptcy. To that amount, therefore, the debt was not merely defective, but it did not subsist at all: the case is not, therefore, within the statute. By the 18th sect. of the act, it is provided, that the new debt should be not anterior to the debt found insufficient. Here it cannot be said that the debts of the present petitioner are not anterior to a debt found insufficient, for the 63*l.* 15*s.* 10½*d.* was no debt at all; and no new debt can be said to be not anterior to what has no existence—*Ex parte Ullathorne* (2).

Mr. Anderdon was not called upon in reply.

(2) 1 Mont. D. & D. 338. Reported on the question of Costs in 10 Law J. Rep. (N.S.) Bankr. 10.

SIR JOHN CROSS.—The petitioners shew sufficient debts proved, if they were not anterior to the debt which has turned out to be insufficient. It was proved by the bankrupt, that the insufficient debt was on a bill given on the 6th day of January last, for a debt already due; but the bankrupt also says, that 12*l.* odd was contracted in March. So much of the petitioning creditor's debt as has been considered insufficient was, at least, contracted on the 6th of January, prior to the petitioners' debts (3). Let the usual order be made that the fiat do proceed.

Mr. Parker then asked for the costs of the bankrupt on the former petition, in which he had succeeded.

SIR JOHN CROSS.—How can I give you costs which will immediately become the property of the assignees?

Mr. Parker.—The solicitor is entitled to a lien upon them, and to that extent they would not become the property of the assignees.

SIR JOHN CROSS.—The Court will do what it can to protect the solicitor; but as it is improbable that his costs have not already been provided for, the Court will require an affidavit negating any such presumption, before it will interfere in his behalf.

July 29th.—An affidavit of the solicitor was on this day produced, and the Court directed that the costs of the bankrupt and the assignee on the first petition, should be paid by Messrs. Holtum, the petitioning creditors.

1842. } *Ex parte* SCHOLEFIELD *re*
June 15. } SCHOLEFIELD.

Indictment—Allowance for Defence of Bankrupt—Bankrupt Assignee.

The Court will not direct an allowance to be made to a bankrupt, to enable him to defend an indictment, on the representation

(3) It would appear that this question was immaterial, for, as the 12*l.* still remained an essential part of the debts upon which the fiat was to be supported, that fact alone would prevent the petitioning creditor's debt from dating earlier than the period when it was incurred. If the 12*l.* had not so remained, the order could not have been made upon the evidence before the Court.

that his acquittal would prove beneficial to the estate, where any of the assignees object.

Semble—An assignee who has become bankrupt, is incompetent to act, even before his removal.

On the 7th of March 1842,—

Mr. Elderton, on behalf of the bankrupt, applied to the Court to direct the allowance of funds out of the assets, to enable the applicant to defend an action against a party claiming to prove for a sum of 1,180*l*. On an indictment the petitioner had been found guilty, but had obtained a rule for a new trial, on which, if the defence succeeded, he represented that the estate would be materially benefited; upon which occasion the Court, upon the understanding that the assignees (who appeared by Mr. Keene) consented to the application, granted an order for 100*l*. One of the assignees having refused to avail himself of the permission,—

Mr. Elderton applied for an order, making it compulsory on the assignees to grant the allowance, and cited *Gregg v. Taylor* (1).

Mr. Keene, for the official assignee and one of the creditors' assignees, offered no opposition to the order; but

Mr. Bacon, for the other assignee, objected to the order, as it was not proved that the allowance would be for the benefit of the estate, and urged, that the fact of the assignees objecting, was a sufficient reason for the Court not making the order. The consent of the other creditors' assignee is immaterial, as he has become bankrupt, and liable to be removed.

SIR JOHN CROSS.—I cannot listen to what an assignee, who has himself become bankrupt, may say, as he is liable to be removed, and is virtually no longer an assignee; and if this were not so, neither he nor the official assignee do more than submit without opposition. I do not find, therefore, that two of the assignees consent, as represented; the third dissents. I am, therefore, of opinion, that this petition must be dismissed (2).

(1) 4 Russ. 479.

(2) See *Nye v. Maule*, 4 Myl. & Cr. 342; *s.c.* 8 Law J. Rep. (N.S.) Chanc. 329; *Johnston v. Todd*, 3 Beav. 218.

1842. }
June 15. } *Ex parte* LIVINGSTONE *re* COOKE.

Jurisdiction—Removal of Trustee—Ireland.

The Court of Review has jurisdiction to remove a trustee of real property in Ireland who has become bankrupt in England.

In this case, which was a petition for the removal of the bankrupt from the office of trustee, the bankrupt, who appeared in person, objected to the jurisdiction of the Court, because part of the trust property was real estate in Ireland (1).

Mr. Lovat, for the petitioners.

Mr. Heathfield, for the official assignee.

Mr. Rogers and Mr. Bourdillon, for different *cestui que trusts*.

SIR JOHN CROSS.—The bankruptcy being in England, this Court has jurisdiction to remove a trustee, though the property be situated in Ireland. I shall therefore make the usual order.

1842. }
June 16. } *Ex parte* RICKES *re* MORTIN.

Solicitor to the Fiat—Leave to bid.

The solicitor to the fiat was allowed, with the consent of the assignees, to bid at the sale of part of the bankrupt's property, of which he was mortgagee.

In this case, Mr. Bagshawe applied for leave for the solicitor to bid at the sale of some of the bankrupt's real estates. The solicitor was a mortgagee on the estates.

Mr. Heale consented to the prayer of the petition on behalf of the assignees.

SIR JOHN CROSS made the order (2).

(1) See 6 Geo. 4. c. 16. s. 79, in which Ireland is expressly mentioned with reference to a trustee of stock in any public company, but not with reference to real estate; whereas in section 64, and the substituted provision of 1 & 2 Will. 4. c. 56. s. 26, which relate to real estates in which the bankrupt has a beneficial interest, Ireland is also expressly named.

(2) See *Ex parte Towne*, 2 Mont. & Ayr. 29; *s.c.* 4 Dea. & Chit. 519; 4 Law J. Rep. (N.S.) Bankr. 2.

1842. } *Ex parte* KENRICK HAMPSON
April 25. } *re* BURKITT.

Dividend—Clerk's Salary.

Semble—The payment of six months' salary to a clerk or servant, will be made when a balance in favour of the estate is ascertained, and before a dividend is declared.

Mr. Ellis, on behalf of the petitioner, asked for an order for payment of six months' salary, amounting to 31*l.*, due to him as clerk to the bankrupt.

Mr. Anderdon, for the assignees.—The petitioner, though entitled to be paid in full, is not entitled in priority to the other creditors. The commissioner has declined to declare a dividend during the pendency of an action by the assignees for the recovery of further assets. By the 48th section, the time of payment is not fixed, and it is therefore discretionary.

[*SIR J. CROSS*.—How does the petitioner shew a right to priority of payment over the expenses of executing the fiat?]

Mr. Ellis.—Any delay in payment of servants is evidently contrary to the spirit of the clause of the act, and the petitioner was entitled to immediate payment under the order of the commissioner.

Mr. Anderdon.—The order was made when no assets existed, when there was nothing in hand, and when it was difficult to say what could be realized.

Mr. Ellis.—It is unfair towards the petitioner to leave his money in a fund which might be increased, for the benefit of the creditors, by the result of an action, which could confer no benefit on him.

SIR J. CROSS.—By the general law, the creditors come in for their due proportion on distribution; but by the 6th of Geo. 4. an exception was engrafted in favour of clerks and servants, entitling them to certain payments in full, not saying when, but merely allowing the whole instead of a dividend on the amount. This being an exception to the general rule, the Court is not bound to give it a liberal construction, but it ought, rather, as an exception, to be construed strictly. Neither orders nor statute say anything about time, as in the case of the expenses of the petitioning creditor. It is, therefore, requisite to look to the

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means of payment of the expenses of working the fiat. An action to recover assets is, if approved, legitimately part of the working. It would not be right before it is ascertained that there will be a balance in favour of the estate, to order payment to the petitioner. It will be better for him to accept the offer of the assignees, and let the petition stand over until the result shall become known. It will not be requisite to wait for a dividend, but merely until it shall be seen that there will be a sufficient fund after the expenses of the action and the working of the commission have been paid.

1842. } *Ex parte* LOVITT *re* MORTIN.
June 16. }

Assignee—Permission to bid.

An assignee, with the consent of his co-assignee and a great majority of the creditors, allowed to bid at the sale of the bankrupt's property.

Mr. Bagshawe applied on behalf of one of the assignees, for leave to bid at the sale of some of the bankrupt's real estate. It was proved by affidavit, that nine out of eleven creditors, including his co-assignee, consented to the petition.

Mr. Heale, for the co-assignee.

The COURT, after some hesitation, made the order (1).

1842. } *Ex parte* DOBSON *re* BOULT.
July 14. }

Mortgage—Railway Shares.

An equitable mortgagee of railway shares is entitled, on a sale thereof, to be repaid out of the proceeds the amount of calls paid by him to prevent a forfeiture.

In this case, which was the common petition of the equitable mortgagees of some shares in the Great North of England Railway, praying a sale in the usual form, one of the questions raised was, whether the petitioners were entitled to be repaid out of

(1) See *Ex parte* Thwaites, 1 Mont. & Ayr. 323; a. c. 3 Law J. Rep. (N.S.) Bankr. 48; and *Ex parte* Morland, 1 Mont. & M'Ayr. 76.

the proceeds of the sale, the amount of the calls paid by them on the shares.

Mr. Bacon, for the petitioners.

Mr. Crompton and *Mr. Blundell*, for the assignees.

SIR JOHN CROSS.—The petitioners, for the preservation of the property, and to prevent a forfeiture, have paid the calls. If these shares should be sold, the chief value of them will result from the payment of those calls. The petitioners, therefore, are entitled to be paid the amount of the calls out of the proceeds of the sale, and a direction for that purpose must be added to the usual order for sale.

1842. }
July 14. } *Ex parte* and *re* BRIDGMAN.

Assignees, Costs of—Leave to prove.

The assignees are not entitled to their costs of appearing on a petition for leave to prove, where they have no opposition to make, though they have been served.

Mr. Goldsmid appeared on behalf of the assignees, on a petition by the bankrupt, for leave for himself or some other party to prove against his estate for a debt due from him, as the executor of one William Charles Bridgman, and asked for their costs, on the ground of their having been served.

Mr. Sheffield, for the petitioners.

SIR JOHN CROSS.—The appearance of the assignees is quite gratuitous; I cannot make the petitioners pay their costs. They may take them out of the estate.

1842. }
July 15. } *Ex parte* BARNETT *re* COHEN.

Assignee, Petition to remove—Proof.

A creditor may petition the Court for the removal of an assignee, though he has not proved his debt.

An affidavit by the solicitor of the petitioner as to his belief, is not sufficient evidence of his being a creditor on an application for the removal of such assignee.

This was the petition of a creditor on the estate, who had not proved, and prayed the

removal of an assignee who had become insolvent.

Mr. Jeremy, for the petitioner.

Mr. Anderdon objected, that the petitioner had no *locus standi* in this court, as he had not proved under the bankruptcy.

SIR JOHN CROSS was about to make the order prayed, observing, that this was the complaint of a person who stated on his oath, that he was a creditor of the estate, when

Mr. Anderdon objected, that there was no other affidavit than that of the solicitor of the creditor, as to his belief, upon which

HIS HONOUR observed, that this was not sufficient, and dismissed the petition, with costs.

1842. }
July 16. } *Ex parte* SHERBORN *re* STANFORD.

Costs—Substitution of New Petitioning Creditor's Debt.

The costs of an application to substitute a new petitioning creditor's debt, directed to be paid out of the estate, where they could not be obtained from the former petitioning creditor.

This was the petition of a creditor who had proved under a fiat issued against the bankrupt on the petition of Charles Maynard, whose debt was found to be insufficient. The petitioner prayed that such fiat might be directed to proceed on his own debt, and that the costs of the application might be paid by Charles Maynard, or out of the bankrupt's estate.

Mr. Bilton, for the petitioner.

Mr. Ralph Thomas, for the assignees.

Maynard did not appear.

It appeared from the affidavits, that Charles Maynard was in insolvent circumstances, and that there was little probability of the petitioner obtaining his costs from him, and on that account—

SIR JOHN CROSS, on making the order prayed, directed, that the costs of the application should be paid out of the estate, in case the petitioner could not obtain them from Maynard (1).

(1) See *Ex parte* Lloyd, 2 Dea. & Ch. 506, and *Ex parte* Ullathorne, 1 Mont. D. & D. 338; s.c. 10 Law J. Rep. (N.S.) Bankr. 10.

1842. } *Ex parte* JOHN BUTLER *re*
 July 20; } JAMES BAKEWELL.
 Aug. 2. }

Third Fiat—Acquiescence—Order and Disposition.

If a party who has been twice bankrupt, is permitted to trade and acquire property without interference on the part of the assignees or creditors under the second bankruptcy, and becomes bankrupt a third time, such property will, in the first instance, be distributable under the third fiat, and the creditors under the second fiat will only be entitled to the surplus, though they had not received 15s. in the pound.

Semble—Parties interested under a second fiat, under which 15s. in the pound was not paid, will be bound by their acquiescence in the subsequent trading of the bankrupt, though from ignorance of the first bankruptcy, they were not cognizant of their rights.

The question raised in this case was, whether property which the bankrupt (who had become so for a third time) had acquired after his second bankruptcy belonged to the petitioner as assignee, under the second commission, or to the respondent who had been appointed assignee under the third bankruptcy.

The original petition, which was presented by the surviving assignee under the second bankruptcy, was heard on the 9th of July 1838, upon which occasion an order was made, referring it to the registrar to make inquiries as to the facts, and a receiver was appointed in the meantime. Upon the principal point, viz. whether the personal effects in question were in the order and disposition of the bankrupt at the time of the third bankruptcy, with the true owner's consent, the report of the registrar, which was made on the 25th of April last, was in favour of the petitioner, as it found that they were not in such order and disposition.

To this part of the report the respondent excepted, and the petitioner also excepted to it, so far as it made certain allowances to Hobson, chiefly consisting of the costs of the action at law, mentioned below; and the petition now came on to be heard on these exceptions, and for further directions.

As the facts appear in the judgment, it

will only be necessary shortly to state the dates of those which are most important.

On the 4th of April 1815, a commission issued against James Bakewell, the bankrupt, and his father, James Bakewell the elder, then carrying on the business of soap-boilers, in partnership at Weston-upon-Trent. A dividend of 6s. 8d. in the pound, was paid under that commission, and the bankrupt obtained his certificate in December 1816, after which he again entered into trade, which he carried on till 1828. On the 19th of April in that year, a second commission was issued against him, as then of Manchester, glue-manufacturer, under which commission the petitioner and Thomas Owens (who died in October 1832) were appointed assignees, and a dividend of 1s. 7d. in the pound only was paid, but the bankrupt obtained his certificate in January 1829, and again commenced trading as a drysalter and size-manufacturer, at Manchester, which he carried on till 1836, when a fiat, dated the 8th of November in that year, was issued against him on an act of bankruptcy committed on the 12th of October previous. On that day he was arrested for debt, and on the 29th of October, was committed to prison. On the 21st of December, he petitioned the Insolvent Debtors Court for his discharge, and made an assignment to the provisional assignee of that court, and obtained his discharge on the 27th of February 1837. Bakewell was, in the meantime, declared a bankrupt for the third time, under the fiat, and Richard Powdrell Hobson, the respondent, was appointed sole assignee under it.

The petition stated, that neither the petitioner nor Owens was aware of Bakewell's bankruptcy in 1815, and set out a letter to the petitioner from Thomas Bakewell, (a brother of the bankrupt,) dated the 31st of October 1836, which he alleged to have been the first intimation he received of that fact.

The petitioner also made an affidavit in which he denied any knowledge of the first bankruptcy till after the third had taken place.

It appeared that the question had been raised at law, in an action of trover brought in the month of February 1837, in the Common Pleas, by the present petitioner against the respondent, but as the defendant

in that action set up the right of the provisional assignee of the Insolvent Debtors Court, and the Court of Common Pleas held that even if a third fiat were void, (a question which it did not decide,) the right of such assignee would be an answer to the plaintiff's claim, the question between the parties was not decided.

[A report of the proceedings at law will be found under the name of *Butler v. Hobson* (1).]

Mr. Bacon and *Mr. Bagshawe*, for the petitioners, contended, that inasmuch as 15s. in the pound was not paid under the second commission, all the property which the bankrupt had acquired subsequently to that commission, vested in the assignees under it, by force of the 127th section of the 6 Geo. 4; and that having no property upon which a third fiat could operate, such fiat was void, and the property obtained by the respondent, as assignee under it, belonged to the petitioner. It is said that such property has become vested in the assignee under the third fiat, by force of the 72nd section of that act; but in order to make out that proposition, it must be proved that the effects in question were left in the order and disposition of the bankrupt, with the consent of the true owner, who, in this case, is the present petitioner. It may be true, that he has not done any act in assertion of his rights; but unless he knew of those rights, he cannot be said to have given any consent; and unless he knew of the first bankruptcy, he did not know that he was the true owner; and it cannot be said that he gave any consent in that character to the quiet enjoyment of the property by the bankrupt, for he was ignorant of his right to interfere with such enjoyment. That knowledge of their rights is most material in cases where it is sought to prejudice parties by their conduct, appears from the case of *Dillon v. Parker* (2). The following cases were also cited:—

Ex parte Storks, 3 Ves. & Bea. 105; s. c. 2 Rose, 179.

Ex parte Chambers, 2 Mont. & Ayr. 440, 474.

Mr. T. Chandless and *Mr. B. L. Chapman*, for Hobson, the assignee under the

third fiat, relied chiefly upon the 72nd section of the Bankrupt Act, and the recent case of *Ex parte Jungmichel* (3).

Mr. Bacon, in reply.

Cur. adv. vult.

August 2.—*SIR JOHN CROSS*.—In this case, Hobson, the assignee under the fiat, has been called upon to pay over to the petitioners the produce of the estate and effects of the bankrupt, that have come to his hands, the petitioner insisting upon his prior title, as the party had been bankrupt twice before, and his estate had not paid 15s. in the pound to his creditors on his second bankruptcy, and consequently that all his effects have devolved upon the petitioner, as the assignee under the second commission. In answer to this claim, Hobson says, I have a prior right, for you have permitted the bankrupt to go forth to the world as a trader, thereby abandoning the legal right which had previously vested in you. In reply to that, the petitioner says, I did not know when I acted as assignee under the second commission, that there had been a prior commission, and on that allegation of want of knowledge he rests his whole case. The petitioner brought an action for the recovery of these effects, but the suit was attended with no satisfactory result, for justice was wrecked amidst an accumulation of special pleadings, which so complicated the case, that the question between the parties was not determined in that action. As the case appears at present, I cannot but regret that the petitioner did not come to this court in the first instance. It is not disputed, that if the last trading had been carried on with the consent of the assignee under the former bankruptcy, all the effects would, by force of the statute, have passed out of him to the assignee under the last bankruptcy. But in deciding this case, I do not look to the 72nd section of the act, but to the great principle of equity which was first recognized by Lord Camden in *Troughton v. Gitley* (4), and afterwards by Lord Eldon in *Ex parte Bourne* (5). I am aware that Lord Eldon once declined to give his consent to *Troughton v. Gitley*, not because he objected to the principle thereby established, but to

(1) 4 Bing. N.C. 290; s. c. 5 Ibid. 128; 7 Law J. Rep. (N.S.) C.P. 148; 8 Law J. Rep. (N.S.) C.P. 81.

(2) 1 Swanst. 359, see p. 379; Jac. 505.

(3) *Ante*, p. 13.

(4) Ambl. 630.

(5) 2 Glyn & Jam. 137.

the ultimate decision upon the facts of the particular case. His words in *Bourne's case* are remarkable; he there says (6), "Take the instance of a commission taken out in 1820, and another taken out against the same person four or five years afterwards upon a subsequent trading; according to the strict law, the creditors taking out the commission in 1820 would have a right to all the subsequently acquired property, until he should have obtained his certificate under such first commission; but if he has been permitted to go into the world as a trader, and to gain credit as such, whatever a court of law might say about the rights of the creditors under the first commission, this Court has said that it will support the second commission to this extent, that it would not permit the creditors, under the first commission, to take that which they could not take without injustice to the creditors under the second, whom they have permitted to deal with the bankrupt as if he had his certificate, and that they should only take that part of the bankrupt's subsequently acquired property which should remain after all the creditors, who had been so permitted to deal with him after the first commission should have been paid; that the profits derived by the bankrupt from such subsequent dealings, shall belong to the creditors under the first commission, but the debts contracted in his trading after he secondly engaged in trade with the permission of those creditors, shall be first paid." That is the principle upon which this case must be decided. This brings me to the consideration of the facts of the case. It appears, that so long ago as the year 1815, Bakewell first became bankrupt, and that having obtained his certificate, he, in the following year, commenced trading in another place, having removed from Staffordshire to Derbyshire, and then to Manchester, where he took a lease of certain premises for the purpose of his trade. Two years after obtaining his certificate under the first bankruptcy, the bankrupt married the sister of the petitioner, and lived afterwards on terms of intimacy with him, and had various dealings with him in the course of his trade. It appears also, that on the eve of the second bankruptcy, the petitioner put in an execution against the

bankrupt for a debt of 740*l.*, and that, in order to induce the petitioner to withdraw the execution, the bankrupt conveyed to him his leasehold interest in the premises, on which he carried on his trade, and for a while he became the tenant of the petitioner, and continued to carry on business till his second bankruptcy, which took place a short time after. The petitioner being then a creditor for 650*l.*, and having proved his debt under the commission, he and another person (since deceased) were appointed assignees under the commission. The bankrupt obtained his certificate at the end of the year 1829. Soon afterwards, the petitioner re-assigned the leasehold premises to the bankrupt, and on that occasion received from the bankrupt the sum of 266*l.*, as the price of those premises, which, if the present claim of the petitioner is well founded, was money which ought to have been distributed under the second commission; but the petitioner accepted the price of the premises, dealing with the bankrupt as a free trader. For eight years after that, the bankrupt carried on business as a trader in the midst of his former creditors. It is true, that the petitioner, the assignee, was living at a distance from the bankrupt, but being intimately connected with him, he could not but know what he was doing; besides, it appears that he dealt with him in his trade. In the early part of the year 1836, in which the third fiat issued, the petitioner became the trustee for the bankrupt and his children, (the petitioner's sister having died in October in the previous year,) in the purchase of an estate, and the sum of 1,000*l.* of the bankrupt's passed through his hands in respect of the purchase-money; here was a sum of 1,000*l.* received from the bankrupt, which the petitioner might have claimed as being distributable amongst the creditors under the second fiat, but he did not think fit to do so. All these proceedings took place with the knowledge of the assignee, and for aught I know to the contrary, of the creditors too. It appears, moreover, from the bankrupt's books, that in 1834, business to the amount of 85,000*l.*, in 1835 to the amount of 145,000*l.*, and in 1836 to the amount of 209,000*l.*, was transacted by him; and that just before his last failure, he was owner of goods to the amount of 4,000*l.*; and that all this was acquiesced in by the creditors

under the former commission, who looked on without interference. In October 1835, the bankrupt's wife died, on which occasion the petitioner went over to Manchester, where the bankrupt was at that time carrying on three distinct trades, and consequently had an opportunity of seeing and knowing what he was doing, but he never set up any claim to the effects of the bankrupt, and nothing has been suggested to entitle the assignee to the property in question, except that he did not know of the first bankruptcy. I have heard no evidence going to the extent of shewing the impossibility of his knowing it. Was it not in the *Gazette*, and might he not easily have known it? I cannot presume that he did not know it, and still less that he could not have known it. When his sister married the bankrupt, it is to be supposed that he became aware of the first commission, and that inquiry was made, whether a certificate had been obtained under it. I do not wish to say, that the petitioner intended to speak falsely: when he swore that he did not know it, he might have forgotten it, thinking it immaterial, and so it was, except for the latent right in question. I am therefore of opinion, that he did know it (7). But his ignorance of that fact, if made out, would be of no avail, after he has looked on for so long a period as eight years, and seen his debtor carrying on trade without interfering. Nobody says that the other creditors or the other assignee did not know of the first commission; all the petitioner says is, that he did not know of it. I am therefore of opinion, that the petitioner cannot establish the claim set up on this petition; the right of property is in the assignee under the third fiat, who has got it, and the petition must be dismissed. With reference to the real estate, which the bankrupt had at the date of the third fiat, I am of opinion, that the principle of equity applies as much to real as personal estate, though it is not, of course, within the 72nd section of the act. The creditors under the third fiat have, therefore, a priority; but if there should be any surplus, it will belong to the creditors under the second fiat; and the petition must be dismissed. As

(7) Might it not be added, that it must be considered to have been the duty of the petitioner, when appointed assignee, to have inquired into a fact so material to the interest of the creditors, for whom he was trustee, as a prior bankruptcy?

the contest is between two trustees for trust property, and it does not appear that the conduct of the petitioner has been vexatious, the costs of both parties must come out of the estate, including the costs of the inquiry, which was directed by the Court, as the act of the Court injures no one.

1842.
Aug. 2.

Ex parte JOSEPHUS FERRIS,
ONE OF THE PUBLIC OFFI-
CERS OF THE WESTERN DIS-
TRICT BANKING COMPANY,
re TIMOTHY BOURNE.

Proof for Costs of Judgment.

A plaintiff in an action, who obtained a Judge's order for judgment against the bankrupt, which he might have entered up before the fiat, will be entitled to prove for the costs, though, owing to the defendant asking for time, judgment was not actually entered up till after the fiat.

This was a petition for liberty to prove a sum of 364*l.* 9*s.* 8*d.*, the amount of a debt and costs due to the banking company. The petition stated, that the bankrupt was indebted to the banking company in 325*l.* 3*s.* 8*d.* for money lent, and that on the 24th of February 1840, the company commenced an action of debt in the Exchequer in the name of George Hawtayne, one of their public officers, for the recovery of such debt, and on the 4th day of May 1840 declared in the action.

On the 30th of July 1841, the following order was made in the action by Mr. Baron Alderson:—"Upon hearing the attornies or agents for the plaintiff, and the defendant in person, and by consent, I do order, that upon payment of 325*l.* 3*s.* 8*d.*, the debt due from the defendant to the plaintiff, for which the action is brought, together with costs to be taxed and paid on the 6th of November next after, all further proceedings in this cause be stayed. And I further order, that in case default be made in payment, as aforesaid, the plaintiff shall be at liberty to sign final judgment, and issue execution for the whole amount remaining unpaid at the time of such default, with costs of judgment, registering the same, and execution, sheriff's poundage, officers' fees,

and all other incidental expenses, whether by *fiery facias* or *oapias ad satisfaciendum*." After that order was made, the bankrupt requested the company to be allowed till the 20th of December last, to pay the debt and costs, and in consequence of such application, the plaintiff delayed to sign final judgment.

On the 13th of December 1841, a fiat was issued against Bourne, and afterwards the costs were taxed at the sum of 39l. 6s., and on the 24th of that month, the plaintiff signed final judgment for the debt and costs.

The commissioners refused to receive the proof, for the reasons stated in the following letter of the solicitor to the fiat, namely,—
"The commissioners thought, as the question was still involved in so much uncertainty, they ought not to take upon themselves to admit the proofs without the direction of the Court of Review, to which, therefore, they considered it their duty to refer the parties; for they observe, that the parties, had they used due diligence, might have obtained the judgment in time; but not having done so, and as the difficulty has consequently been created by themselves, it was but reasonable that they should be called upon to remove it. The dividend was, for the present, adjourned *sine die*, in order to allow time for you to obtain the order of the Court."

Mr. Anderson, for the petitioner, referred to the 58th section of 6 Geo. 4. c. 16, which authorized a party proving for a debt for which he should have obtained a judgment, to prove also "for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy."

Mr. Kenyon S. Parker, contra.—The assignees do not wish to offer any improper opposition to the petitioner's claim, but they think it right to submit to the Court, whether a party, who has given time, and not signed final judgment till after the bankruptcy, is entitled to the benefit of the section of the act upon which the petitioner relies; in this case, the petitioner had not obtained either a verdict or judgment at the time of the bankruptcy.

SIR JOHN CROSS.—It appears to me, that the order of the learned Judge is equivalent to a judgment, and that the petitioner was

entitled to enter up judgment at any time. But he gave time at the request of the bankrupt, who could not, therefore, take advantage of such delay: the assignees who represent him are in no better situation. There are several cases upon the question of proof for costs. In *Ex parte Poucher* (1), there was a verdict before the bankruptcy (and what has taken place in this case amounts to the same thing), and a judgment after; and Sir John Leach held, that the costs of the judgment were proveable. On the authority of that case I shall give the petitioner leave to prove.

1842. } *Ex parte* BENSON *re* ACREMAN
Aug. 2. } AND CO.

Ship and Shipping—Proof against part owners.

A party who has supplied goods for the outfit of a ship which belongs to several persons, some of whom are also partners in trade, cannot prove against the joint estate of such partners, even for the purpose only of voting in the choice of assignees and assenting to the certificate.

This was the petition of Benson, a tradesman, who had supplied sails and other articles for the outfit of two vessels which belonged as to eight 64th parts to Frederick William Green, and as to the remaining fifty-six 64ths to Messrs. Acreman & Co., the three bankrupts, who were partners: the goods had been ordered by Green as the managing owner.

On the creditor applying to prove against the estate of the bankrupts, the commissioners allowed him to prove, for the purpose of voting in the choice of assignees and assenting to the certificate; but as they considered it as a partnership debt of Green and the bankrupts, and Green was solvent, they would not allow the proof for the purpose of receiving dividends. The creditor, not being satisfied with the decision of the commissioners, petitioned the Court for an unlimited proof. It appeared that the vessels were then on a voyage earning freight.

Mr. Wood, for the petitioners.—Though the three bankrupts were partners, as be-

(1) 1 Glyn & Jam. 385; s. c. 2 Law J. Rep. Chanc. 168.

tween themselves, there was no partnership between them and Green. Their being owners of the same ships did not make them partners, for, as such, they are tenants in common, or part owners. The contrary doctrine, once held in *Doddington v. Hallet* (1), was solemnly overruled by Lord Eldon in *Ex parte Young* (2), and being part owners of the ships, they are part owners, and not partners of the freight earned by them. Tenants in common in land are not partners as to the rent. The goods having been supplied for the use of their vessels, the law implies a joint contract for payment from all the owners, and they are liable as co-contractors and not as partners; the commissioners were therefore wrong in treating this as a case within the 62nd section of 6 Geo. 4. The distinction contended for between partners and co-contractors, was clearly laid down in the following cases:—

(1) 1 Ves. sen. 497.

(2) 2 Ves. & Bea. 242.

Ex parte Crosfield, 2 Mont. & Ayr. 543; s. c. 1 Dea. 405; 6 Law J. Rep. (N.S.) Bankr. 13.

Ex parte Bauerman, Mont. & Chit. 569.

Ex parte Buckingham, 1 Mont. D. & D. 235; s. c. 9 Law J. Rep. (N.S.) Bankr. 34.

Mr. Anderdon, contra.—If, as the petitioner contends, the debt is not due from the owners of the vessels as partners, there can be no proof against the joint estate of the bankrupts; each of the bankrupts would be separately liable; and the petitioner being, therefore, a separate creditor, cannot prove in competition with the joint creditors of the bankrupt firm, for, according to his own shewing, he is not a creditor of the firm.

SIR JOHN CROSS.—It is a joint contract of the four, and the question is, whether the creditor can prove against three. I do not see how the petitioner can entitle himself to prove against the three.

Petition dismissed.

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— of real estates to trustees, upon trust, (subject to the dower of testator’s wife, and subject to the principal and interest charged thereon by mortgage or otherwise,) to receive the rents and profits, and after deducting the dower and interest on the mortgages, to pay the same for the purposes therein mentioned. No estate of testator out of which wife was entitled to dower. Words do not by implication give the wife a right to a payment out of the estate, in the nature of dower; and the relation of the parties cannot be taken into consideration, 305

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— of lands to trustees, upon trust for G. R. for life; remainder to his issue in tail male in strict settlement, provided that all persons coming into possession of the estate should, within one year, take the name and arms of T, on the same condition, as far as circumstances would permit, as lands in S. were limited in another will, which was, that the estate should go over to the persons next entitled, upon the person in possession becoming entitled to the barony of D; provided, in case of neglect, refusal, or discontinuance to use such name, &c., the estate should go over as if the party so neglecting, &c. were dead, if tenant for life, or if in tail, as if there was a failure of the issue in tail. G. R. has five daughters only. On exceptions to the Master’s report, approving of a settlement excluding them, —Held, first, that the daughters of G. R. took collectively in tail male, with cross-remainders as tenants in common, and were entitled to a limitation to that effect, after the limitation to the first and other sons. The words “tail male,” describing the estate; “issue,” the persons taking after the first taker; and “in strict settlement,” the mode in which such first taker took; the forfeiture, on breach of the condition of taking the name, &c., pointing to a plurality of persons, the daughters of G. R. took as tenants in common. Secondly, that although the clause in the will of the estate in S. did not literally apply to a life estate, yet G. R. was bound by it, and his life estate would clearly cease on the accession of the barony of D. to him, and that this should not affect the issue in tail, unless there were other issue capable of inheriting the estate; and that forfeitures by reason of refusal to take the name and arms of T. should not extend to collateral issue in tail, 417

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- deed, and praying that such other securities might be first applied:—Held, upon exceptions, that B. could not by his answer decline to set forth such list, on the ground that they were his title deeds, nor to give such statement of his banking account, 17
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- East India Company*. See Production of Documents.
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